Supreme Court, U.S.
FILED
JAN 3 1994
OFFICE OF THE CLERK

93-1093

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT DALE MURR, *et al.*,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ Of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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135 pp

QUESTIONS PRESENTED FOR REVIEW

I. Is it constitutionally legitimate for a federal prosecutor to threaten additional charges to induce a defendant to plead guilty and, after promising that the government will not further charge the defendant for known offenses and representing that there are no other active investigations, then to bring the threatened charges in another federal district not mentioned in the plea agreement and withhold that information from the defendant while his plea agreement is pending acceptance before the original District Court?

II. Concerning the supervision element of the offense of conducting a continuing criminal enterprise, 21 U.S.C. § 848, does the Jencks Act preempt the granting of a bill of particulars under Rule 7(f) of the Federal Rules of Criminal Procedure for the identity of the individuals allegedly supervised, organized or managed, and how should the jury be instructed regarding the supervision element to ensure a defendant a fair trial and verdict?

III. Can an accused receive a fair trail when an absent co-conspirator is tried *in absentia*, in violation of *Crosby* v. *United States* and Rule 43 of the Federal Rules of Criminal Procedure, and when the government as part of its case introduces proof of the absent co-defendant's flight and fugitive status as evidence of guilt?

PARTIES TO THE PROCEEDING

Petitioner Robert Dale Murr was prosecuted as a defendant for violations of 21 U.S.C. §§ 841(a)(1), 846, and 848 in the United States District Court for the Eastern District of Kentucky, at Lexington. Petitioner Murr appealed his conviction as an appellant to the United States Court of Appeals for the Sixth Circuit, whose judgment is sought to be reviewed. The following codefendants-appellants also were parties to the direct appeal proceedings before the United States Court of Appeals for the Sixth Circuit: Robert Phibbs, Victor Rojas, Diane Whited, and Raymond Huckelby.

Respondent United States of America was the plaintiff-appellee below. At trial, the United States was represented by the Offices of the United States Attorneys for the Eastern District of Tennessee and the Eastern District of Kentucky.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Dale Murr respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above proceeding on August 5, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 999 F.2d 1053 (6th Cir. 1993), and is reprinted in the appendix hereto (Appendix A) at 1a. The order of the United States Court of Appeals for the Sixth Cir-

cuit denying the petition for rehearing and the petition for rehearing en banc is unreported and is reprinted in the appendix (Appendix B) at 66a. The opinions, orders, and excerpts of proceedings of the United States District Court for the Eastern District of Kentucky are unreported and are reprinted in the appendix (Appendices C, D, E, and F), at 67a, 70a, 73a, and 76a.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on August 5, 1993, and a timely petition for rehearing and suggestion for rehearing en banc was denied on October 4, 1993. The jurisdiction of this Court to review the judgment is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part,

> No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . .

21 U.S.C. § 848 provides in relevant part,

> **§ 848. Continuing Criminal Enterprise**
>
> . . .
>
> (c) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if —
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter —

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

18 U.S.C. § 3500 provides in relevant part,

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

Rule 7(f) of the Federal Rules of Criminal Procedure provides,

(f) The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 43 of the Federal Rules of Criminal Procedure provides in relevant part,

. . .

(b) The further progress of the trial to and including the return of the verdict shall not be prevented and

> the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), ...

STATEMENT OF THE CASE

A. The Tennessee Prosecution and Plea Agreement

Over a seven-year period, from 1982 to 1989, the FBI developed information that Petitioner Robert Dale Murr was involved in a large-scale cocaine distribution organization, and he was identified as a major, multi-kilo supplier of cocaine in the Eastern District of Tennessee. On August 17, 1989, Mr. Murr was arrested in Knoxville, Tennessee on federal cocaine distribution charges. The charges encompassed a very narrow aspect of Mr. Murr's known drug-related activities; namely, the distribution of ten ounces of cocaine on July 4, 1989, the distribution of 500 grams of cocaine on August 17, 1989, and the use of a telephone and telephone paging device to facilitate cocaine distribution.

East Tennessee FBI Case Agent, Clyde Merryman, who held the opinion that Mr. Murr had conducted a continuing criminal enterprise in Knoxville, informed Mr. Murr's counsel at the time of Mr. Murr's arrest of the potential for RICO or CCE charges. Then, during a two-day pretrial detention hearing, the government focused on Mr. Murr's extensive drug enterprise and supplied the following information to pretrial services who recommended that Mr. Murr be detained:

> Information from the U.S. Attorney's office and the FBI suggests that the defendant is a major multi-kilo supplier of cocaine in the Eastern District of Tennessee. He has been under surveillance by the FBI

> since 1982 and has been closely linked to drug kingpin Jerry LeQuire having been employed by LeQuire to locate airplanes and air strips in Monroe County to facilitate kilo drug transactions. Further information from the U.S. Attorney's Office revealed that the defendant aided in hiding LeQuire while LeQuire was a fugitive from justice. Also the defendant hired an individual by the name of Jerry Franklin Parks whose only job was to deliver drugs for the defendant, with full knowledge by the defendant that Parks was on federal parole at the time.

Further information about Mr. Murr's drug enterprise came to light during the discovery process and motion hearings on the indicted charges.

Nine days before Mr. Murr's Tennessee charges were set for trial, Assistant U.S. Attorney Mike Winck suggested to defense counsel that it was advisable to work out the case because even if Mr. Murr was acquitted, another indictment would be forthcoming charging a drug consipiracy involving Mr. Murr and Jerry Parks, and there was still the potential for RICO or CCE charges. The prospect of these additional, more serious charges induced Mr. Murr to enter into plea negotiations to resolve all of his difficulties and to receive the most lenient sentence possible.

Since it is common knowledge that cocaine does not grow in East Tennessee, Mr. Murr potentially was subject to further prosecution in numerous jurisdictions for the multi-kilo amounts of cocaine (not charged in the Tennessee indictment) that the government knew he had distributed in the Eastern District of Tennessee.[1] Pursuant to Department of Justice

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[1] For the cocaine he distributed in East Tennessee, for example, Mr. Murr could have been charged with conspiracy to possess with intent to distribute not only in the Eastern District of Tennessee but also in any district through which the cocaine passed before entering East Tennessee, regardless whether Mr. Murr had any knowldege of the pipeline route.

"policy," Assistant U.S. Attorney Winck disclaimed authority, however, to deal on tax matters, to extend protection in all federal districts, or to bind any other district without the consent of the local U.S. Attorney's office in that district.

Mr. Murr's attorney, nevertheless, pressed the prosecutor to investigate and identify any other problems facing Mr. Murr. Inquiries were made about civil forfeitures, and AUSA Winck reported that no forfeiture action was anticipated. With that assurance, the parties reached an agreement that as part of the criminal prosecution, Mr. Murr would forfeit a truck and repay $30,000.00 for the cocaine purchased from Mr. Murr. Next, the parties discussed Mr. Murr's association with Bobby Joe Wilson who had been arrested in the Northern District of Georgia with five kilograms of cocaine. That matter was the subject of a known grand jury investigation in the Northern District of Georgia. AUSA Winck contacted the U.S. Attorney's Office in the Northern District of Georgia and obtained approval to extend protection from further prosecution in that district.

Mr. Murr's attorney asked if there were other investigations anywhere else concerning Mr. Murr. Mr. Winck said he was aware of none. Mr. Murr's attorney mentioned the Northern District of Florida, which AUSA Winck believed was the source of the cocaine Mr. Murr had distributed in East Tennessee. Mr. Murr's attorney asked that the Northern District of Florida be contacted, but AUSA Winck did not think Florida was a concern and responded, "[B]ecause your concern was about something that I felt was so remote that it was a waste of time and that rather than call them and risk generating a concern by them it is better left — sleeping dogs are better left to lie as they are or something to that effect." Mr. Moncier's recollection was that AUSA Winck advised that they should not contact other jurisdictions to obtain a global disposition unless there was an active, ongoing investigation of Mr. Murr. After stating that Florida not be contacted, AUSA Winck either told Mr. Murr's attorney that he was unaware of any further investigations in other jurisdic-

tions or said that he was unaware of any other district in which Mr. Murr had a problem.

AUSA Winck then drafted a plea agreement that was presented to District Judge James Jarvis on January 16, 1990. Mr. Murr agreed to plead guilty to distribution of approximately ten ounces of cocaine on July 4, 1989 and distribution of 500 grams of cocaine on August 17, 1989. The agreement stated that "the parties agree to a ceiling of 66 months for a sentence in this case." A proviso added, "The parties agree that if the court does not accept this agreement or if the minimum offense level under the sentencing guidelines is more than 66 months, that the defendant will retain the right to withdraw from this plea agreement and proceed to trial." Pursuant to AUSA Winck's earlier advice, he drafted paragraph five of the plea agreement as follows:

> 5. If the defendant complies with the terms of this agreement, the United States will not further charge the defendant in the Eastern District of Tennessee for those non-tax related offenses of which it presently has knowledge. It is further agreed that the defendant will not be prosecuted in the Northern District of Georgia for any non-tax related offenses concerning actions involving Bobby Joe Wilson.

District Judge Jarvis deferred acceptance of the plea agreement pending receipt of a presentence investigation. That investigaion was not completed until April 10, 1990. At a hearing on June 12, 1990, District Judge Jarvis accepted the plea agreement and sentenced Mr. Murr to 63 months imprisonment and imposed a fine of $70,000.00.

B. The Subsequent Kentucky Prosecution

FBI Agent Merryman had been opposed to Mr. Murr's plea agreement and felt that the agreement was too lenient. Shortly after the plea agreement was made and prior to its acceptance, the government began formulating plans to repros-

ecute Mr. Murr on cocaine conspiracy and continuing criminal enterprise charges. The FBI arrested Jerry Parks on February 23, 1990, in Nashville, Tennessee for cocaine distribution. Parks had been named as working for Mr. Murr but whose only job was to deliver drugs and had been named by AUSA Winck during plea negotiations as a co-conspirator with Mr. Murr in the contemplated, additional charges. When apprehended, Jerry Parks offered to cooperate.[2] According to FBI Agent Merryman, Parks confirmed a lot of things that the FBI already knew.[3] Parks related that the cocaine he distributed for Mr. Murr was being obtained through the Eastern District of Kentucky. Agent Merryman shared Park's information with Assistant U.S. Attorney Winck in February 1990, and Agent Merryman immediately renewed additional prosecution options against Mr. Murr.

Neither Agent Merryman nor Assistant U.S. Attorney Winck disclosed the information from Jerry Parks or the reactivated prosecution to the presentence officer preparing Mr. Murr's report. Likewise, they did not inform Mr. Murr's attorney prior to the plea agreement being accepted. When Mr. Murr was sentenced in June 1990, nothing, in fact, was mentioned to the District Judge or defense counsel about an active Kentucky prosecution, the potential for additional charges, or Parks' information. While the plea agreement was pending acceptance in Tennessee, the U.S. Attorney Offices in Knoxville and Lexington, the Knoxville FBI, and the Lexington

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[2] Despite the outstanding indictment, Jerry Parks was never arraigned before a United States Magistrate or District Judge. He was held in custody in a Nashville hotel for several days, until he was transported to a hotel in Knoxville. Without the assistance of counsel, Parks signed a letter cooperation agreement prepared by Assistant U.S. Attorney Winck. Parks then entered a guilty plea, again without counsel, before District Judge Jarvis who took the plea at the Knoxville hotel where Parks was staying. To date, Parks has not been sentenced.

[3] To date, although requested by the defense, the government has not been required to disclose what information Parks "confirmed" in February 1990 that the FBI already knew prior to Mr. Murr's plea agreement in January 1990.

DEA were meeting to exchange information and to decide how to proceed with a new prosecution.

On March 13, 1991, Mr. Murr was reindicted in the Eastern District of Kentucky and charged with conspiracy to possess with intent to distribute cocaine from May 1, 1988 until the return of the indictment, 21 U.S.C. § 846, eleven substantive counts of possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1), and engaging in a continuing criminal enterprise during the same time frame, 21 U.S.C. § 848. The government's theory of prosecution was that from 1988 through 1990, Parks and/or Mr. Murr and co-defendant Tommy McKeehan would periodically travel from Knoxville, Tennessee to Eastern Kentucky where they (along with other buyers) would purchase cocaine from co-defendant Victor Rojas, who travelled down with the cocaine from New Jersey, and from Kentucky co-defendant Ken Lawson who acted as a broker for the sales. The cocaine was transported to East Tennessee for resale by McKeehan who had his own customers and by Parks who sold to Mr. Murr's customers through the Murr cocaine distribution organization the FBI had identified in its 1982-1989 Tennessee investigation prior to the Tennessee plea agreement.

The Kentucky indictment was jointly prosecuted by the Offices of the United States Attorney for the Eastern District of Tennessee and the Eastern District of Kentucky. Mr. Winck travelled to Kentucky and prosecuted as a Special Assistant U.S. Attorney, along with co-counsel from the Kentucky U.S. Attorney's Office. Knoxville FBI Agent Merryman was the Tennessee case agent for the Kentucky prosecution and worked with the Lexington, Kentucky DEA Office.

Prior to trial, Mr. Murr moved to dismiss the Kentucky indictment as violating his earlier Tennessee plea agreement and submitted a detailed account of the Tennessee prosecution and plea negotiations, supported by transcripts, pleadings, exhibits and discovery from the previous prosecution. An evidentiary hearing was held on August 8, 1991, and

the motion was taken under advisement. On September 9, 1991, the District Court orally denied the motion, and a written order overruling the motion was entered on September 12, 1991. (App. C at 67a; App. E. at 73a). A post-trial Memorandum Opinion and Order entered May 22, 1992, further supplemented the previous orders. (App. F at 76a).

On September 13, 1993, trial commenced on the Kentucky charges. By that time, five of the defendants had changed their pleas, and codefendant Kenneth Lawson was tried *in absentia*, over objection of his counsel and counsel for the remaining co-defendants. Despite pretrial defense requests, the government did not identify the individuals allegedly supervised by Mr. Murr in the continuing criminal enterprise until arguments on the defense motions for judgment of acquittal. The jury received no unanimity or other special instruction about these individuals.

On October 9, 1991, the jury returned a verdict of guilty against Mr. Murr on the conspiracy and CCE counts and on ten of the eleven substantive counts. During post-trial motions, the District Court sustained Mr. Murr's motion for judgment of acquittal on Count 10, a substantive charge, and the District Court further ruled that the proof concerning one of the seven individuals allegedly supervised by Murr was insufficient on the CCE charge. Otherwise, the verdicts were affirmed. Mr. Murr was sentenced on Counts 1 through 9, 11 and 13 to serve a term of imprisonment of 260 months.[4]

Mr. Murr timely appealed from the final judgment of conviction to the United States Court of Appeals for the Sixth Circuit. On August 5, 1993, the Sixth Circuit issued its written opinion and judgment affirming Mr. Murr's conviction. (App. A at 1a). Thereafter, on October 4, 1993, the Sixth Circuit denied Mr. Murr's petition for rehearing and suggestion for rehearings en banc. (App. B at 66a).

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[4] In a separate, related sentencing appeal, Mr. Murr challenged his dual convictions for conspiracy and CCE. The United States Court of Appeals for the Sixth Circuit vacated his conviction and judgment on the conspiracy charge in Count 1 of the indictment.

REASONS FOR GRANTING THE WRIT

I. THE PLEA AGREEMENT

The plea agreement and sentencing process in this case has been abused by the prosecuting attorney. The Court should grant certiorari to formulate specific due process safeguards so that when federal prosecutors threaten additional charges to induce guilty pleas, the resulting plea agreements are fairly enforced to afford defendants the expected benefits of their bargains.

As part of the "give-and-take" of plea negotiations, this Court has accepted as legitimate that additional charges may be threatened by a prosecutor to induce a defendant to plead guilty. *E.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). Acceptance of that practice, however, as with all of the policy considerations favoring plea bargaining, "presuppose fairness in securing agreement between an accused and a prosecutor." *Santobello* v. *New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 498, 30 L.Ed.2d 427, 432 (1971). In this case, the Court is called upon to address the constitutional limits and assumed obligations when a plea agreement is secured by threatening additional charges.

A. THE DECISIONS BELOW DESTROY ANY MUTUALITY OF ADVANTAGE TO THE TENNESSEE PLEA AGREEMENT BY GIVING NO EFFECT TO WHAT THE DEFENDANT REASONABLY UNDERSTOOD AND BY IGNORING THE INDUCEMENT THAT PERSUADED HIM TO PLEAD GUILTY.

From the time that Mr. Murr was arrested in Knoxville, the government representatives in Tennessee affirmatively led Mr. Murr to believe that he could expect to face additional, more serious charges. The very day of his arrest, Knoxville FBI Agent Merryman informed Mr. Murr's counsels of the potential for RICO and CCE charges. (R. 290 at 155-56).

During the course of the two-day detention hearing and while obtaining discovery and preparing for trial on the Tennessee charges, the defense continuously was reminded that the government believed that Jerry Parks and Mr. Murr had been importing a large amount of cocaine through various individuals. No fewer than eight confidential informants were mentioned by FBI Agent Merryman at the detention hearing as having supplied information about Murr's organization. Actual names also came up during discovery and motions, including McKeehan, Phibbs, England, Huckelby, and Dye, who were all later indicted as co-conspirators in the Kentucky prosecution. Finally, when AUSA Winck, who was the East Tennessee head of the Organized Crime Drug Enforcement Task Force, broached the subject of a plea agreement with Mr. Murr's counsel, the advisability of working out the case was presented in terms of if Mr. Murr went to trial he would be reindicted with Jerry Parks in other narcotics transactions.[5] The potential for CCE charges was also discussed.[6]

Under these circumstances, it is hardly surprising that Mr. Murr was persuaded that if a plea agreement was not reached, the government had the wherewithal and every intention to bring additional, much more serious charges against him for his drug-related activities, including drug conspiracy and CCE charges. That being the case, the ques-

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[5] Mr. Murr's counsel recalls that AUSA Winck said that even if Mr. Murr were found guilty, he was going to be reindicted with Jerry Parks on narcotics charges. AUSA Winck recalls that he informed defense counsel if Mr. Murr went to trial, there was a "strong likelihood" that he would be reindicted with Parks in other narcotics transactions. (R. 290 at 158-60, 199-200).

[6] Mr. Murr's counsel remembers that the potential for CCE charges was specifically discussed when AUSA Winck brought up working out the case. AUSA Winck simply does not recall if CCE charges were discussed, but he testified at the evidentiary hearing on Mr. Murr's Motion to Dismiss that if it was discussed, he would have been candid and told defense counsel that CCE was a possibility. (R. 290 at 158-60, 199-200).

tion then becomes one of reconciling what the government did and said during the Tennessee prosecution with the position it took during the subsequent Kentucky prosecution; namely, that when Mr. Murr entered into the Tennessee plea agreement, it did not know that Mr. Murr's drug distribution organization was using a supply pipeline through Kentucky and that there was insufficient evidence at that time to support charging Mr. Murr with conducting a continuing criminal enterprise.[7]

If the government's subsequent claim of ignorance is accepted at face value, it necessarily follows that Mr. Murr was induced to plead guilty in Tennessee based on false and misleading information and threats. The charges brought in Kentucky were exactly what was being threatened in Tennessee. As the evidence at trial in Kentucky demonstrated, Mr. Murr did not conduct one continuing enterprise in Tennessee and a completely separate continuing criminal enterprise in Kentucky; there was but a single "enterprise" that for venue purposes could have been prosecuted either in Kentucky or Tennessee. Similarly, Mr. Murr was not part of one drug conspiracy in Tennessee and a completely different drug conspiracy in Kentucky. There was only one conspiracy to possess cocaine with the intent to distribute that, because of the Kentucky supply route, could have been prosecuted either in Kentucky or Tennessee. Indeed, during the Kentucky prosecution, the government conceded that the Kentucky charges against Mr. Murr could have been prosecuted in Tennessee. In effect, the government offered Mr. Murr a plea agreement in Tennessee that was accepted to avoid CCE and conspiracy charges, and then the same prosecutor who negotiated the agreement took the CCE and conspiracy charges up the interstate and prosecuted this case to avoid the agreement in Tennessee.

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[7] *See* Memorandum Opinion and Order (filed May 22, 1992). App. F at 76a.

It is helpful to contrast what happened in this case with the prosecutor's actions in *Bordenkircher* v. *Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). The defendant was originally indicted in Kentucky on the charge of uttering a forged instrument. During plea bargaining conferences, the prosecutor told defendant that if he did not plead guilty, he would seek an habitual criminal indictment, with a mandatory life sentence. When the defendant declined to plead guilty, the prosecutor carried through on his threat. It was undisputed that the recidivist charge "was fully justified by the evidence" and that "the prosecutor was in possession of this evidence at the time of the original indictment." 434 U.S. at 359, 98 S.Ct. at 666, 54 L.Ed.2d at 608.

In seeking federal habeas corpus relief from his conviction as an habitual offender, the defendant claimed that he was the victim of prosecutorial vindictiveness. This Court disagreed. Relevant to the instant petition for writ of certiorari is the Court's discussion of the plea bargaining process.

> . . . [A] rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged. See *Blackledge* v. *Allison*, 431 U.S., at 76, 97 S.Ct., at 1630.
>
> There is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

434 U.S. at 363-65, 98 S.Ct. at 668-69. *See also United States v. Goodwin*, 457 U.S. 368, 378, 102 S.Ct. 2485, 2491, 73 L.Ed.2d 74, 84 (1982) ("[t]he outcome in *Bordenkircher* was mandated by this Court's acceptance of plea negotiation as a legitimate process.").

What has prompted the serious issues in this case of plea negotiation misconduct and generated extensive litigation is that AUSA Winck was not open and forthright in his plea negotiations with the defense. From the beginning of the Tennessee prosecution, the government planted and encouraged the defense suspicion that just over the prosecutorial horizon much more serious drug conspiracy and CCE charges awaited indictment. Of course, had AUSA Winck been forthright about his threat and the actual nature of the additional charges that could be secured, that leverage may not have been sufficient to discourage Mr. Murr from asserting his trial rights in Tennessee. It does not follow therefrom, however, that a prosecutor is free to resort to any pressure that will induce a plea.

B. THE DECISIONS BELOW DEPRIVE DEFENDANT OF THE BENEFITS OF HIS PLEA AGREEMENT BY FAILING TO ENFORCE THE SPIRIT OF THE COMMITMENTS MADE BY THE PROSECUTOR WHO NEGOTIATED THE PLEA AGREEMENT.

The Knoxville U.S. Attorney's Office and Knoxville FBI instituted and were directly responsible for prosecuting Mr. Murr in Kentucky. AUSA Winck's promise not to further charge Mr. Murr in the Eastern District of Tennessee would be worthless and hollow, indeed, if he could evade it simply by being designated a special prosecutor in another district (as occurred in this case), moving the investigation up the interstate and then reindicting Mr. Murr. To conclude otherwise converts a plea agreement into an exercise in linguistic proficiency in which the defendant must insist on an exactly prescribed combination of words and phrases, and where a

slip of the quill pen can spell disaster for a defendant. *See In re Arnett*, 804 F.2d 1200, 1203 (11th Cir. 1986) ("hypertechnical reading of the written agreement" and "a rigidly literal approach in the construction of language" should not be accepted).

In *Santobello* v. *New York*, 404 U.S. 264, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971), the defendant entered into a plea negotiation with the Assistant District Attorney in charge of the case to be permitted to plead guilty to a lesser included offense. The prosecutor also agreed to make no recommendation as to the sentence. At sentencing, another prosecutor appeared and recommended the maximum sentence. This Court ruled that the State had failed to keep its promise to the defendant concerning the sentencing recommendations. The Court so ruled despite that the sentencing recommendation promise apparently was not included in Santobello's written plea agreement. The Court further pointed out that the staff of attorneys in a prosecutor's office have the duty of letting each other know what they have done or are doing. 404 U.S. at 262, 92 S.Ct. at 499, 30 L.Ed.2d at 433.

By contrast, under the analysis employed by the lower courts in the instant case, defendant Santobello would not have prevailed. The Sixth Circuit would hold that the ultimate product of the plea negotiations reflected no promise about a sentencing recommendation. The Sixth Circuit would place the burden on Santobello to get a promise that other prosecutors would make no sentencing recommendation. Finally, even if Santobello had received the first prosecutor's promise that no one handling the case would make a sentencing recommendation, the Sixth Circuit would question whether that promise was binding on other prosecutors.[8]

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[8] Mr. Murr's Tennessee plea agreement contained a provision protecting him from prosecution in the Northern District of Georgia. The evidence in this record establishes that the Northern District of Georgia "personally" agreed to this provision. Nevertheless, the Sixth Circuit commented that it

The decisions below, in other words, fail to reflect and follow this Court's practical view of plea negotiations and this Court's constitutional concerns that the process presupposes fairness and should be interpreted to ensure the defendant what is reasonably due in the circumstances. In the instant case, it never occurred to Mr. Murr or his counsel to ask AUSA Winck to promise that *he* and the Knoxville FBI would not travel outside the Eastern District of Tennessee and prosecute Mr. Murr elsewhere for the very offenses they were agreeing not to prosecute Mr. Murr for in Tennessee. There was no reason whatsoever to suspect that such a promise was necessary.

Even in those Federal Circuits that take the strict approach that a plea agreement binds only the office that makes the agreement unless it appears that an agreement contemplates a broader restriction, an important consideration is the degree of independence with which the later prosecution develops. *See United States* v. *DiNapoli*, 817 F.2d 978, 979 (2d Cir. 1987); *United States* v. *Laskow*, 688 F.Supp. 851, 855 (E.D.N.Y.), *aff'd*, 867 F.2d 1425 (2d Cir. 1988) ("This is not a case where one district, unable to pursue a conviction against a defendant, passes along its work product to a sister district in order to circumvent a restriction on prosecution."). *See also United States* v. *Robison*, 924 F.2d 612, 614 (6th Cir. 1991) (noting the split of authority whether a U.S. Attorney in one district can bind another U.S. Attorney in another district but regarding as important the degree of collaboration between separate prosecutions in interpreting plea agreements; "the investigation leading to the North Carolina indictment was unconnected to and independent of the one resulting in the Michigan prosecution.").

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may have been "nothing more than good fortune" that Mr. Murr was not prosecuted in the Northern District of Georgia because it is unclear whether a federal prosecutor in one district can bind prosecutors in another federal district. (App. A at 48a n.13).

Here, the same prosecutor and same FBI agent took the case and prosecuted the same case in a separate district. That Kentucky specifically was not a party to the Tennessee plea agreement at the time it was made, consequently, should not be dispositive of the question as to what protection from prosecution Mr. Murr received pursuant to his agreement. When Kentucky entered into a joint venture with Tennessee to prosecute this matter, it became bound by and responsible for the promises and representations made by its Tennessee co-workers and co-prosecutors.[9] It is disingenuous under these circumstances for the government to claim it was free to prosecute Mr. Murr in Kentucky, because Kentucky was not specifically mentioned in the plea agreement.

C. THE DECISIONS BELOW LEAVE PROSECUTORS UNACCOUNTABLE FOR THE ADVERSE CONSEQUENCES A DEFENDANT SUFFERS BY RELYING ON PROSECUTION REPRESENTATIONS DURING PLEA NEGOTIATIONS.

The "no-prosecution" language in the plea agreement was based on AUSA Winck's plan and advice not to contact or to include in the agreement any jurisdictions that were not ac-

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[9] This conclusion is further reinforced by the evidence that the Kentucky prosecutors really were only interested in proceeding against co-defendants Rojas, Lawson and the other people involved in the April 1990 Berea, Kentucky drug transaction, charged in Count 12 of the indictment. (R. 661 at 60-61, 164-65). The Kentucky jury returned a not guilty verdict on this count as to Mr. Murr. Kentucky wanted Jerry Parks to be available to testify against Rojas and Lawson, and Kentucky needed the cooperation of Tennessee regarding Parks. In fact, according to the lead Kentucky prosecutor, it was not until about a month before the Kentucky indictment was returned that the Kentucky authorities actually had an outline of the Tennessee defendants and the evidence against them. (R. 661 at 61). Likewise, the Tennessee prosecutors were not particularly interested in the Kentucky aspect of the case. They were of the opinion that Mr. Murr and the other Tennessee defendants could be prosecuted in the Eastern District of Tennessee. (R. 661 at 27, 40, 42-43, 127-28, 135-37).

tively investigating Mr. Murr. To place the issue in context, it is common knowledge that cocaine does not grow in East Tennessee. Anyone facing charges for narcotics not grown or produced in a jurisdiction is always potentially subject to prosecution in numerous jurisdictions because of the far-reaching nature of conspiracy law and *Pinkerton* liability for substantive offenses committed by others. In the context of plea negotiations, the question becomes one of identifying the "problem" jurisdictions.[10]

Mr. Murr's counsel began by identifying for AUSA Winck two problem jurisdictions, Georgia and Florida. In Georgia, there was a known, active grand jury investigation concerning Mr. Murr's involvement with Bobby Joe Wilson who had been arrested in Georgia with five kilograms of cocaine. Concerning Florida, AUSA Winck believed the cocaine that Mr. Murr was distributing through his organization in Tennessee came from Florida, but neither AUSA Winck nor defense counsel was aware of any active investigation of Mr. Murr in Florida at that time.

AUSA Winck contacted Georgia and got approval to include that district in the plea agreement. He advised, however, that Florida should not be contacted, and it was not mentioned in the plea agreement. AUSA Winck explained his advice as follows: "I recall telling you [during plea negotiations] because your concern was about something that I felt was so remote that it was a waste of time and that rather than call them and risk generating a concern by them it is better

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[10] It is incorrect to assume that a defendant will always know where he is subject to potential prosecution. Frequently, a defendant is unaware of all the activities of his co-defendants. Nevertheless, the actions of a co-defendant in other jurisdictions can supply the requisite venue to prosecute a defendant in a jurisdiction with which he has no personal contacts. This problem, moreover, is not confined to drug-related offenses, but easily can arise in numerous situations, including mail fraud, money laundering, gambling, food and drug offenses, antitrust violations, and environmental crimes.

left — sleeping dogs are better left to lie as they are or something to that affect [*sic*]." (R. 290 at 204-05).

Having been advised by AUSA Winck, a representative of the Department of Justice, to leave alone jurisdictions, such as Florida, that were not investigating him, Mr. Murr had no reason to pursue inclusion of any other jurisdictions in his plea agreement unless there was an active investigation. Kentucky, like Florida, had no active investigation of Mr. Murr underway at the time of the Tennessee plea negotiations; the active Kentucky investigation of Mr. Murr was initiated by AUSA Winck and Knoxville FBI Agent Merryman only after the Tennessee plea agreement was reached.

An analogous situation arose in *United States* v. *Hall*, 730 F. Supp. 646 (M.D. Pa. 1990). The defendant was indicted for currency reporting violations. He entered into a plea agreement, signed by the U.S. Attorney for the Middle District of Pennsylvania, and pleaded guilty to three counts. After sentencing, the U.S. Attorney, who had by then become a Deputy Assistant Secretary in the Treasury Department, instituted an action to enforce a civil penalty arising from the criminal violations. Defendant Hall objected that the civil penalty violated representations made to induce him to plead guilty by the prosecutor who actually negotiated the plea agreement. According to the defendant, the negotiating prosecutor represented that the U.S. Attorney's office had no other open investigations concerning him and that he was not a target in the Middle District or any other district. 730 F. Supp. at 649-50.

Based on the totality of the circumstances and applying the guidelines announced by this Court in *Santobello*, the District Court in *United States* v. *Hall* concluded that the representations of government counsel were part of the plea agreement even though they were not contained in the formal plea agreement itself. To secure for the defendant the basic fairness of his agreement, the District Court then dismissed the civil assessment action brought by the government. 730 F. Supp. at 651-53.

By contrast, the lower courts in the instant case felt that Mr. Murr assumed the risk by not mentioning Kentucky and having it included in the agreement. That solution, however, unfairly absolves the prosecution of any responsibility for a defendant's detrimental reliance on governmental representations during plea negotiations.[11] The constitutional message must not be that plea bargaining presupposes fairness only if the defendant "gets it in writing" and that otherwise the defendant should not rely on anything a prosecutor says.

Underlying the lower courts' decisions in this case is the assumption that AUSA Winck most likely would not have made the Tennessee agreement, which provided for a sentence of no more than 66 months, had he known about Kentucky. That assumption is misdirected for three reasons. First, AUSA Winck obtained permission to include Georgia in the plea agreement even though he knew Georgia had an active investigation involving five kilograms of cocaine. (R. 290 at 203). That additional cocaine would have increased Mr. Murr's exposure from a five-year to a ten-year minimum mandatory sentence under 21 U.S.C. § 841(b)(1)(A). Nevertheless, AUSA Winck agreed to a ceiling of 66 months in the plea agreement.

Second, AUSA Winck believed that the cocaine Mr. Murr distributed in Tennessee came from Florida. (R. 290 at 205-06). Nevertheless, he advised "letting sleeping dogs lie" in Florida and agreed to a ceiling of 66 months in the Tennessee plea agreement. There is no logical reason to suppose that AUSA Winck would not have made the deal he did with Mr. Murr if he thought the cocaine came from Kentucky instead of Florida. Nor is it correct to assume that Kentucky, unlike Georgia, would not have acquiesced in the Tennessee plea. As noted previously, Kentucky simply wanted Jerry Parks to prosecute the Berea, Kentucky incident involving Rojas and

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[11] That solution further overlooks that the advice to "let sleeping dogs lie" would be worthless if AUSA Winck were then allowed to be the one who stirred up the sleeping dogs and led them to attack, as occurred in this case.

Lawson. Agreeing to the Tennessee plea with Mr. Murr in no way would have stymied Kentucky's intentions in that regard.

Finally, a court's interpretation of a plea agreement should not be influenced by its impression that the government made a bad deal. Just as the courts refuse, as a general rule, to question prosecutorial discretion in bringing charges, the courts should not intervene to question the prosecutorial wisdom in settling cases.

D. A PLEA AGREEMENT THAT INCORPORATES OUTSIDE INFORMATION CANNOT FAIRLY BE INTERPRETED BY REVIEWING ONLY THE LANGUAGE CONTAINED IN THE PLEA AGREEMENT.

In its decision below, the Sixth Circuit ruled, "As we detect nothing akin to fraud surrounding the construction of the Tennessee plea agreement, the district court was correct in not going beyond its four corners to find that it did not bar Murr's prosecution in the instant case." Of course, *Santobello* rejected the notion that prosecutorial culpability determines whether a plea agreement has been breached. *See Santobello* v. *New York*, 404 U.S. at 262, 92 S.Ct. at 499. Equally important, however, is that this plea agreement contemplated that its enforcement would require going outside the four corners of the agreement to ascertain the government's knowledge.

As revealed in a confidential memorandum prepared by Agent Merryman in February 1991, the government fully anticipated that Mr. Murr would move to dismiss the Kentucky indictment pursuant to his Tennessee plea agreement.[12]

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[12] In that memorandum, Agent Merryman characterized the plea agreement as "very generous." he reported that the wording of the agreement, whereby Mr. Murr would not face any future prosecution for any activity of which the FBI had knowledge, "has been questioned on several different occasions by various members of the UNITED STATES ATTORNEY'S OF-

Thereafter, throughout the Kentucky prosecution, the government was evasive about the specifics of its prior knowledge. For example, when asked whether the offenses to which Mr. Murr pleaded guility in Tennessee were done in furtherance of the charged Kentucky conspiracy, AUSA Winck said he was not sure. (R. 290 at 211-12). He later admitted that Mr. Murr probably could not have been reprosecuted for everything Parks told them because some things were already known, but when asked what did the government not know about, except Kentucky, before Parks began cooperating, AUSA Winck replied, "I don't remember everything that he told us and, you know, I don't know to answer that question." (R. 661 at 28).

What is clear, however, is that the Eastern District of Tennessee had extensive information even prior to Mr. Murr's arrest on August 17, 1989, that led the prosecution team in Knoxville to believe (and represent to the Knoxville District Court) that Mr. Murr was involved in a major cocaine distribution organization. Tennessee knew that Mr. Murr had to be distributing cocaine that came from other jurisdictions. In December 1989, FBI Agent Merryman had testified, "We had a very specific investigative plan at that time [July 1989] regarding Mr. Murr and a number of his associates we identified. . . . We planned on working on the Dale Murr drug organization for a period we were estimating would last a year or eighteen months . . . that centered not only on Mr. Murr, but on a lot of his associates both in Tennessee and out of Tennessee." (R. 193, Attachment G at 97-98). A United States Probation Office report on Jerry Parks, dated June 28, 1989, moreover stated, "[T]he FBI has provided the United States Probation Office with very sensitive information linking Mr. Parks to the sale of large quantities of cocaine. . . .

FICE." Agent Merryman also reported that he intended to review all of the transcipts from the Tennessee prosecution "to evaluate what information was presented" and "to look for any areas where Attorney MONCIER may challenge the right of the Government to indict MURR again." (R. 661 at 81-89: Murr Ex. 3).

Criminal indictments are forthcoming. . . ." (R. 193, Attachment F).

FBI Agent Merryman further admitted that when debriefed in February 1990, Parks "confirmed" things the government had known. (R. 290 at 128). At trial in Kentucky, Agent Merryman testified, "By the time I had sat down with Jerry Parks . . . I knew a heck of a lot about this man, and it is going to be hard for him to lie to me. I don't go into that situation ignorant. I go into it as informed as I possibly can be." (R. 654 at 218). Parks related at trial that when he began cooperating, the government agents showed him "reams and reams of paper the first week" that they went over and reviewed. (R. 649 at 14-15). Parks, as the defense discovered, was not the only person supplying information; Agent Merryman testified before the Kentucky grand jury that a person named Gary Parks had provided drug-related information about Mr. Murr and his associates. (R. 488, Attachment 23 at 52-53).[13]

Shortly before trial on the Kentucky charges, the defense also received tape recordings of conversations that occurred in 1989 between an FBI informant and Parks; those recordings had been requested during the Tennessee prosecution, but the government had resisted producing them at that time. Those recordings contain Parks statements, before he began cooperating with the government, that his drugs were coming out of New Jersey and New York (co-defendant Rojas'

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[13] Additionally, Kentucky co-defendant Dye was known to be an associate of Parks, and the government in Tennessee had subpoenaed the telephone records of Mr. Murr and Kentucky co-defendants McKeehan and England in 1988. Agent Merryman had confidential sources who had been present at meetings with Mr. Murr and Kentucky co-defendant Huckelby, and FBI Agent Merryman testified before the Kentucky grand jury that Huckelby had been a drug dealer target of the FBI and DEA in Tennessee for several years. The government knew about Mr. Murr's business ventures in Tennessee and knew that Kentucky co-defendant Phibbs and witness Ernie Nicely worked in and managed those businesses. The government further knew that Mr. Murr and Kentucky co-defendant Ken Lawson were associated, and Mr. Murr had been interviewed about Mr. Lawson.

residence) and that Parks' girlfriend has a sugar daddy in Kentucky. Parks' taped statements indicated a drug pipeline from New York to Tennessee. (R. 384; R. 400). With these tapes, the defense learned of the identity of another person, Freddie Morton, who was present during some of Parks' statements. Mr. Morton gave an affidavit that in the Spring of 1989, Parks told the FBI informant that his drugs were coming out of Kentucky. (R. 478, Attachment B).

Considerable effort, accordingly, was devoted in an attempt to unravel exactly what the government knew, but the defense was never provided complete discovery of the government's investigative files to explore the specifics of that knowledge. Consequently, the findings of the lower courts that the Tennessee authorities were unaware that Mr. Murr was obtaining the drugs distributed in Tennessee through Kentucky until Jerry Parks began cooperating in February 1990 are, by no means, reliable, and there has never been a meaningful hearing where the government has been required to provide full disclosure.

E. THE DECISIONS BELOW PERMIT PROSECUTORS TO CONCEAL MATERIAL FACTS FROM DEFENDANTS AND THEIR COUNSEL WHILE PLEA AGREEMENTS ARE PENDING AND TO CONCEAL RELEVANT INFORMATION FROM JUDGES CONSIDERING PLEA AGREEMENTS AND SENTENCING.

A fraud was committed when Mr. Murr's plea agreement was pending before the District Court. AUSA Winck knew there had been a material change in circumstances since the plea agreement was negotiated regarding an active investigation of Mr. Murr, but he failed to bring this information to the attention of the defense, the District Court, or the presentence officer. This intentional concealment of material facts constitutionally prejudiced the plea process and Mr. Murr.[14]

[14] This issue was fully briefed but never addressed by the Sixth Circuit in its final judgment below.

Had Mr. Murr been made aware of the new active investigation, he could have attempted to withdraw his plea. Kentucky then could have been contacted for inclusion in a new plea agreement. Mr. Murr could have reconsidered the opportunity to cooperate. Had the District Court known of the relevant conduct under investigation, it could have properly evaluated the plea agreement and either rejected or accepted the agreement. Last, the offenses under investigation could have been consolidated whereby Mr. Murr would have been subjected to only one prosecution and punishment for the conduct included within the "enterprise" rather than facing separate, cumulative prosecutions and punishments.

After representing during plea negotiations that there were no other active investigation or problem areas and after drafting the plea agreement based upon that representation, AUSA Winck had no right to withhold material information he learned about the new, active investigation and stand mute as Mr. Murr's plea was being considered for acceptance. By doing so, he knowingly permitted Mr. Murr to continue to believe that the plea agreement pending before the District Court was a global resolution of his problems, although AUSA Winck knew that this was no longer true. The fraudulent concealment of the change of circumstances, while the plea agreement was pending acceptance by the District Court, violates this Court's imposition of constitutional limitations on a prosecutor's exercise of discretion in the plea process and denied Mr. Murr due process of law. *See Bordenkircher* v. *Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

This Court also has recognized as a fundamental sentencing principle that "[t]he sentencing court or jury *must* be permitted to consider any and all information that reasonably might bear on the proper sentence for the particular defendant, given the crime committed." *Wasman* v. *United States*, 468 U.S 559, 563, 104 S.Ct. 3217, 3220, 82 L.Ed.2d 424 (1984) (emphasis added). This broad, largely unlimited inquiry is required to ensure "that the punishment should fit the offender and not merely the crime." *Williams* v. *New York*,

337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed. 1337 (1949). *See also Roberts* v. *United States*, 445 U.S. 552, 556, 100 S.Ct. 1358, 1362, 63 L.Ed.2d 622 (1980) (fundamental sentencing principle that judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."). The fraudulent concealment of the change of circumstances in this case undermined the sentencing court's authority and responsibilities and successfully allowed the government to impose consecutive, cumulative punishment on Mr. Murr in Kentucky after he had been sentenced in Tennessee pursuant to his plea agreement.

II. CCE SUPERVISEES

Certiorari, furthermore, should be granted in this case to provide guidance about the supervision element of a continuing criminal enterprise offense under 21 U.S.C. § 848.

Mr. Murr filed a pretrial motion in this case for a bill of particulars seeking the identities of the individuals whom he allegedly supervised or managed in connection with the charged continuing criminal enterprise. The District Court denied the motion because "such disclosure pre-trial is not permitted by the Jencks Act, 18 U.S.C. § 3500." (App. D at 71a). It was not, in fact, until after the close of the government's proof at trial that the prosecution identified the persons Mr. Murr was alleged to have organized or supervised. The Sixth Circuit echoed this same, curious reasoning finding no prejudice because, *inter alia*, Agent Merryman's grand jury testimony was provided to the defense as Jencks Act materials. (App. A at 57a).

Guidance by this Court is needed to prevent the Jencks Act from stripping vitality from Rule 7(f) of the Federal Rules of Criminal Procedure which authorizes the filing of a bill of particulars. The identity of persons allegedly supervised in connection with a CCE offense is critical information to a defendant facing such a charge to prepare a defense and avoid surprise at trial. Disclosing this information does not re-

quire the production of witness statements controlled by the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure. The decisions below effectively blur this distinction and ignore the valid reasons that may support granting a bill of particulars.

Guidance is also needed so that courts may properly inform juries how to evaluate the evidence to determine if the supervision element of a continuing criminal enterprise offense has been proven beyond a reasonable doubt. The Sixth Circuit acknowledged that it had not adopted any pattern instruction for CCE offenses. (App. A at 58a).

This case presents a practical framework within which to formulate the necessary safeguards and instructions to guide the factfinder at trial. The District Court couched its instruction to the jury on the management element of the CCE offense in the general language of the CCE statute; it refused all defense requests to instruct either on those people who were eligible supervisees or on those who as a matter of law were not eligible. The District Court also would not consider giving a special unanimity instruction or a special verdict form, as the defense requested. In closing arguments the government appealed to the jury as follows: "And then you've seen the workings of Mr. Murr's operation. He had people working for him. And that's why he is charged with a continuing criminal enterprise, Count Thirteen, because he had more than five people working for him. He had Jerry Parks. He had Ernie Nicely. He had Bobby Phibbs. He had Judy Murr. He had Diane Whited. And he had Tommy McKeehan." (R. 659 at 83). Subsequently, in ruling upon Mr. Murr's post-trial motion for judgment of acquittal, the District Court then ruled that there was insufficient evidence that Judy Murr was managed by Mr. Murr. (App. F at 96a). Nevertheless, the District Court would not order a new trial on the CCE charge.

The key, distinguishing feature of the CCE offense is the supervisory element; this case illustrates the genuine need for guidance concerning this important element.

III. SEVERANCE

Trial in this case began on September 13, 1991. At that time, one of Mr. Murr's co-defentants, Kenneth Lawson, was absent and could not be located. The government moved to try Lawson *in absentia*. Lawson's counsel objected, and counsel for Mr. Murr moved for a severance of co-defendant Lawson from the prosecution. (R. 645 at 12-21). The District Court granted the government's request to try Lawson *in absentia*.

During the trial, Mr. Lawson's absence and flight were then brought up by the government at least five times during the direct examination of prosecution witnesses concerning Lawson's whereabouts. Moreover, the government argued Mr. Lawson's flight as evidence of his guilt in closing arguments. (R. 646 at 26-27; R. 653 at 198-201, 207-10, 218-21; R. 658 at 99-100). Mr. Lawson was ultimately convicted by the jury, *in absentia*.

On direct appeal to the United States Court of Appeals for the Sixth Circuit, Mr. Murr and his co-appellants again raised the severance issue concerning the prosecution of co-defendant Lawson *in absentia*. While this case was pending before the Sixth Circuit and shortly before oral arguments, this Court issued its opinion in *Crosby* v. *United States*, 506 U.S. ____, 113 S.Ct. 748, 122 L. Ed.2d 25 (1993). This Court held in *Crosby* that Rule 43 of the Federal Rules of Criminal Procedure prohibits the trial *in absentia* of a defendant who absconds prior to trial and is absent at its beginning.

Although the *Crosby* decision was brought to the Sixth Circuit's attention in a timely manner, the lower court never mentioned *Crosby* in its written opinion and final judgment. The Sixth Circuit analyzed the issue as a traditional severance question and concluded that the District Court did not abuse its discretion in denying the motion to sever Lawson.

This Court should grant certiorari to consider whether an accused can receive a fair trial when he is jointly prosecuted with a co-defendant who has absconded and is absent at the beginning of the trial. This issue assumes, as supported by the

record below, that the defendants who properly appeared for trial played no part in their co-defendant's pretrial absence.

The District Court in this case gave a cautionary instruction to the jury that Mr. Lawson's flight and fugitive status could not be used as evidence against the other defendants. Nevertheless, deliberately spreading before the jury that this co-defendant, who stood accused with Mr. Murr and the others, was a fugitive and had fled from prosecution was at least as devastating and powerful as the extrajudicial incriminating statements in *Bruton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *Cruz* v. *New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1986).

Mr. Lawson's flight in this case communicated to the jury, every bit as clearly as an oral or written confession on his behalf, that the charges leveled in this case were true. This case, therefore, falls within the context of those situations previously recognized by this Court "in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton* v. *United States*, 391 U.S. at 135, 88 S.Ct. at 1627, 20 L.Ed.2d at 485.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert PHIBBS (92-5509); Victor Rojas (92-5512/92-5523); Diane Whited (92-5521); Robert Dale Murr (92-5522/92-5730); Raymond Huckelby (92-5529), Defendants-Appellants.

Nos. 92-5508, 92-5512, 92-5521 to 92-5523, 92-5529 and 92-5730.

United States Court of Appeals,
Sixth Circuit.

Argued June 7, 1993.

Decided Aug. 5, 1993.

Defendants were convicted in the Eastern United States District Court, Eastern District of Kentucky, Henry R. Wilhoit, Jr., J., of various drug distribution and conspiracy offenses, and they appealed. The Court of Appeals, Ralph B. Guy, Jr., Circuit Judge, held that: (1) evidence was sufficient to support challenged convictions; (2) prosecution of codefendant tried in absentia did not have to be severed; (3) witnesses with psychiatric problems did not have to be barred from testifying on grounds of incompetency; and (4) there was no error shown in application of Sentencing Guidelines.

Affirmed.

James E. Arehart, Asst. U.S. Atty., Karen K. Caldwell, U.S. Atty., Frances E. Catron, Asst. U.S. Atty. (argued and briefed), Office of U.S. Atty., Lexington, KY, Jacquelyn A. Jess, Asst. U.S. Atty., Office of U.S. Atty., Covington, KY, for plaintiff-appellee U.S.

Andrew M. Stephens (argued and briefed), Lexington, KY, for defendant-appellant Robert Phibbs.

Fred E. Peters (argued and briefed), Lexington, KY, for defendant-appellant Victor Manuel Rojas.

David R. Marshall (argued and briefed), Lexington, KY, for defendant-appellant Diane Whited.

Ann C. Short (argued), Herbert S. Moncier (briefed), Knoxville, TN, for defendant-appellant Robert Dale Murr.

Derek G. Gordon (argued and briefed), Anggelis, Philpot, Gordon, & Simpson, Lexington, KY, for defendant-appellant Raymond Eugene Huckelby.

Before: GUY and SUHRHEINRICH, Circuit Judges, and DOWD, Disrict Judge.*

RALPH B. GUY, Jr., Circuit Judge.

Defendants, Raymond Huckelby, Diane Whited, Robert Phibbs, Victor Rojas, and Robert Murr appeal their convictions arising from their participation in a cocaine distribution ring operating in Tennessee and Kentucky. In addition, Phibbs and Rojas challenge the appropriateness of their sentences.

Huckelby takes issue with the sufficiency of the evidence supporting his convictions. Along with the other defendants, he also expressly adopts and incorporates by reference all common issues raised by his co-defendants.

Whited raises the following allegations of error: (1) her convictions were not based upon sufficient evidence; (2) the district court should have granted a mistrial as a result of prejudicial statements made by a government witness; (3) the court should have severed a co-defendant who was tried in absentia; (4) the government was improperly permitted to elicit certain evidence that was prejudicial to the defense; (5) two key government witnesses should have been declared incompetent to testify; and (6) the court unduly restricted her ability to cross-examine a government agent.

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* The Honorable David D. Dowd, Jr. United States District Court for the Northern District of Ohio, sitting by designation.

Phibbs alleges that: (1) the district court's approach to the voir dire of the jury venire was in error; (2) two government agents were improperly allowed to remain in the courtroom through the proceedings, despite the fact that they served as witnesses; (3) the evidence underlying his convictions was insufficient; and (4) he should have been afforded a reduction in sentence due to his acceptance of responsibility for his offenses, as well as for his "minimal" role in the drug distribution ring.

Rojas argues the following points: (1) the government misused both its grand jury and its administrative subpoena powers; (2) the district court erroneously denied both his motion in limine to suppress evidence of his Colombian origins, as well as his mistrial motion predicated upon prejudicial references to his Colombian ties; (3) he was not provided with a "photospread" used by a government witness in her pretrial identification of him; (4) he was improperly deprived of confidential presentence information; and (5) the district court should have given him a reduction in sentence due to his acceptance of responsibility for his offenses.

Murr contends that: (1) the government breached the terms of a pre-existing plea agreement with him, leading to his prosecution in the instant case; (2) the evidence presented at trial was insufficient to sustain his convictions; (3) the district court erred in denying him a bill of particulars in relation to his continuing criminal enterprise charge, as well as in refusing to give the jury special instructions requested by him; and (4) the government failed to turn over vital *Brady* and Jencks Act evidence to the defense.

We affirm the convictions and the sentences of all five defendants.

I.

On February 23, 1990, Jerry Parks was detained by agents of the FBI in Nashville, Tennessee, in connection with an ongoing drug investigation. After discussions with the government, he agreed to cooperate in the probe.

Parks revealed that his friend, Robert Murr, had visited him a number of times during the summer of 1988 when Parks was residing in a federal "halfway house" in Bowling Green, Kentucky. On some of those occasions, Murr would deliver cocaine to him to sell. Murr wanted Parks to come to Knoxville, Tennessee, to work for him in his drug distribution venture. He directed Robert Phibbs, who was on the payroll of one of Murr's legitimate businesses, Automotive Enterprises, to write a letter to Parks' federal probation officer requesting that he be allowed to transfer to the Knoxville area. Murr told Phibbs to promise the probation authorities that Parks would be provided with a job at Automotive Enterprises. His efforts were rewarding, and Parks was permitted to move to Knoxville.

Parks' position at Automotive Enterprises was a subterfuge; he actually spent his time helping Murr distribute cocaine. In August of 1988, Murr arranged to sell four kilograms of cocaine to Billie Dye and David Hurt. Parks and Dye gathered approximately $100,000 in cash and, pursuant to Murr's instructions, started out for Lexington, Kentucky, where they were to meet with Murr. The pair had car trouble, however, and arrived in Lexington several hours late. After checking into a hotel, Parks called Murr's ex-wife, Judy, the following morning for guidance as to what do do next. Based on his conversation with her, he and Dye returned to Knoxville, where the transaction was consummated the next day.

Beginning in September of 1988, Parks travelled with Murr and another drug dealer named Tommy McKeehan to the Lexington area every few weeks to obtain multi-kilogram quantities of cocaine. During the first such trip, Parks became acquainted with Murr's drug source, Kenneth Lawson. Whenever Murr needed cocaine, he went with McKeehan to a pay telephone and called Lawson. After a deal had been struck, Murr, Parks, and McKeehan would meet at Judy Murr's residence early in the morning before leaving for Kentucky. Murr and McKeehan would then organize the money to be used in the sale into $1,000 bundles, putting these stacks in brown paper bags.

Aside from taking part in these trips, Parks served as the "front man" for the drug distribution ring. Murr introduced Parks to his regular cocaine customers, including Raymond Huckelby and Edward Rogers. At such meetings, Murr would instruct Parks with regard to the amount of cocaine to be supplied, the price of the drug, and how often it was to be furnished. He would then tell Parks and the purchaser to exchange telephone numbers, beeper numbers, and beeper codes in order to stay in contact. For several months, Parks delivered drugs to Murr's customers in this fashion. When Murr was unavailable, Parks would turn over the money he received in return to either Phibbs or to Judy Murr.

In October of 1988, Parks first encountered Victor Rojas while on one of the excursions to Kentucky he made with Murr and McKeehan to buy cocaine. Rojas, who was Lawson's supplier, brought the drugs to the location where the sale would take place. He usually drove a red Jeep, hiding the drugs in the back inside one or more shopping bags, and wrapped in separate kilogram packages. The bags were covered in coffee grounds to mask the odor of the cocaine.

Parks, Murr, and McKeehan would either give their money to Lawson or would leave it in Rojas' vehicle, taking the cocaine for which they had paid. McKeehan would then be given his share. After the drugs were driven back to Knoxville, Parks and Murr stashed them at the house Murr rented for his girlfriend, Diane Whited. She stored the cocaine in the attic in a green duffel bag with a padlock on it. In order for Parks to get the cocaine from Whited's house to distribute, he would have to contact Murr who, in turn, would call Whited to set up a time for the two of them to come over. Parks went to Whited's residence 15 to 20 times in the fall of 1988 to pick up drugs. On at least one occasion, Whited assisted Murr and Parks in breaking down the cocaine into salable quantities.

Keeping the cocaine at Whited's house proved to be unworkable because Parks needed ready access to the stash, and Murr would not let Parks enter the house without him. At the end of November of 1988, Murr told Parks to bury the cocaine in a pipe on the side of a hill behind Automotive Enter-

prises. The only person besides Parks who knew exactly where the drugs were hidden was Phibbs.

The drug distribution ring was so successful that Murr and Lawson talked about what should be done with the rather substantial profits. Murr recognized that he could "launder" some of the funds through his business partner, Ernie Nicely. The companies that he had established with Nicely were not doing well, so Murr began to funnel money to him to keep them afloat. Nicely understood that the bulk of this money was derived from drug sales.

After November of 1988, Murr no longer wanted to accompany Parks and McKeehan to Kentucky to obtain cocaine. Consequently, he sent the two of them alone to complete deals in February, March, April, and May of 1989. Around the time of the May transaction, Rojas began to get nervous about the way in which the meetings were scheduled. He approached McKeehan and gave him a slip of paper with a telephone number on it, imploring him and Parks to contact him directly in the future. When they returned to Knoxville, McKeehan asked Murr whether it would be permissible to bypass Lawson in light of Rojas' overtures. Murr indicated that this was acceptable to him. Approximately 10 days later, Parks and McKeehan set up a transaction with Rojas in the manner he suggested.

Shortly thereafter, on May 22, 1989, the Knoxville police arrested Parks for burglary. He was wounded while in the process of being apprehended. The authorities subsequently seized a set of electronic scales and six address books from him. One of these books contained records of Parks' drug-related activities that month, and included a coded list of some of Murr's customers, as well as a description of the drug ring's cocaine inventory.

Despite Parks' arrest, the drug ring continued to operate. Jim Hurt soon took over some of Parks' functions, delivering cocaine for Murr to Edward Rogers, and possibly others. However, when Rogers complained about the poor quality of the cocaine that Hurt was selling him, Murr began to personally supply Rogers. This continued until August of 1989,

when Murr himself was arrested on federal drug charges. Afterwards, Phibbs tried to collect money from Rogers which he claimed Rogers owed Murr for drugs.

On April 11, 1990, Vivian Cummins observed three men sitting inside the Berea, Kentucky, restaurant where she was employed. They had been drinking coffee for over three hours, and were watching cars pass by on the adjacent highway, Interstate 75. They were eventually joined by a fourth man, later identified as Victor Rojas. Not long after Rojas arrived, Cummins saw the group leave the restaurant and gather in the parking lot around two vehicles, one of them a black Mercedes-Benz. When two of the men quickly exchanged packages, she became suspicious and called the local police.

Rojas and Kenneth Lawson, who was another of the individuals Cummins noticed in the restaurant, were riding in a black Mercedes-Benz when it was stopped by two Berea police officers. Rojas told the officers that he was in Kentucky to sell parts for electric signs. Lawson, however, claimed that he did not know Rojas.

The car was ultimately searched by the Kentucky State Police, who uncovered $124,500 in United States currency. The money was wrapped in $1,000 packets with colored rubber bands. The $1,000 bundles were combined into packages of $5,000 in several small brown lunch-type bags, a grocery bag, and a white plastic bag. These bags were then stuffed into a cardboard box which was taped shut. The box was then placed inside a brown shopping bag with handles. In addition to discovering the cash, the state police detected coffee grounds on the pavement beneath the car, on the bumper of the vehicle, and inside the brown shopping bag. A DEA chemist tested the shopping bag for the presence of controlled substances, and detemined that it contained traces of cocaine.

Murr had entered into a plea agreement with the government in January of 1990 in the Eastern District of Tennessee. It was not until Parks had been questioned in late February of 1990 that the government became aware of Murr's cocaine venture extending into Kentucky. At that time, Parks had

spoken of a individual named "Tony" who, with the assistance of Kenneth Lawson, furnished cocaine to Murr's drug distribution ring. After the events of April 11, 1990. Parks realized that "Tony" was actually Victor Rojas.

On May 2, 1990, a federal grand jury returned a one-count indictment charging Rojas with possession of cocaine with the intent to distribute the drug, pursuant to 21 U.S.C. § 841(a)(1). Upon motion of the government, the district court ordered the indictment and any subsequent pleadings sealed. In the fall of 1990, the FBI could not determine the whereabouts of Rojas. Consequently, on October 10, 1990, the district court approved the issuance of a bench warrant for his arrest.

On March 13, 1991, a federal grand jury returned a 13-count susperseding indictment against Victor Rojas, Robert Murr, Robert Phibbs, Diane Whited, Raymond Huckelby, and eight other defendants, including Billie Dye, David Hurt, Kenneth Lawson, Tommy McKeehan, Mary Lawson, William Baird, Reba England, and Edward Rogers. A trial date was set for September 9, 1991.

The indictment, which was unsealed two weeks later, charged the 13 defendants with conspiring to possess cocaine with the intent to distribute the drug, in violation of 21 U.S.C. § 846. It also charged each of them with 11 counts of cocaine distribution, or aiding and abetting such distribution, in accordance with 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The incidents underlying these counts purportedly took place between August 25, 1988, and April 11, 1990. In addition, Murr was alleged to have operated a continuing criminal enterprise as defined under 21 U.S.C. § 848.

Kenneth Lawson failed to appear for trail in September of 1991, and a bench warrant for his arrest was handed down. McKeehan, Rogers, and David Hurt reached plea agreements with the government and took the stand against their co-defendants. Billie Dye and Reba England also plea bargained. Mary Lawson moved for a judgment of acquittal, which was granted by the district court. On October 9, 1991, the jury found Rojas guilty on all 12 counts against him.

Huckelby and Phibbs were both convicted of conspriracy and on nine distribution counts. Whited was convicted of conspiracy and on three distribution counts. Murr was found guilty of conspriracy, managing a continuing criminal enterprise, and on 10 distribution counts. Kenneth Lawson, who was tried in absentia, was convicted of conspiracy and on 10 distribution counts. William Baird, who had been partially successful on a motion for judgment of acquittal, was found not guilty of the remaining charges against him.

II.

Raymond Huckelby

Sufficiency of the Evidence

Huckelby contends that the evidence presented at trial was insufficient to support his conviction for conspiracy to possess cocaine with the intent to distribute the drug (21 U.S.C. § 846); as well as on nine counts of possession of cocaine, or aiding and abetting the possession of cocaine, with the intent to distribute (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2).

The standard of review for claims of insufficient evidence is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States* v. *Evans*, 883 F.2d 496, 501 (6th Cir. 1989) (quoting *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)) (emphasis in original).

In order to obtain a conviction pursuant to 21 U.S.C. § 846, "the government must prove the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join and participated in the conspiracy." *United States* v. *Pearce*, 912 F.2d 159, 161 (6th Cir.1990) (quoting *United States* v. *Stanley*, 765 F.2d 1224, 1237 (5th Cir. 1985)). No formal or express agreement is necessary to establish a conspiracy under § 846. *United States* v. *Hughes*,

891 F.2d 597, 601 (6th Cir.1989). "[A] tacit or mutual understanding among the parties" is enough. *Id.*

The essential elements of a violation of 21 U.S.C. § 841(a)(1) are "for any person knowingly or intentionally to . . . possess with intent to . . . distribute . . . a controlled substance." *See United States* v. *Pope*, 561 F.2d 663, 669 (6th Cir.1977). "To be found guilty of the crime of aiding and abetting a criminal venture [18 U.S.C. § 2], a defendant must associate himself with the venture in a manner whereby he participates in it as something that he wishes to bring about and seeks by his acts to make succeed." *United States* v. *Knox*, 839 F.2d 285, 294 (6th Cir.1988).

At trial, Jerry Parks testified that in September of 1988, defendant Robert Murr introduced him to a number of individuals "for the distribution of cocaine in [Murr's] network." The first person that Parks met through Murr was Huckelby. Parks and Murr went to Huckelby's jewelry store in Knoxville, Tennessee, where they were taken into a back room to meet with him. While in the rear of the store, Murr asked Parks whether he and Huckelby would "ha[ve] any problem dealing with each other." Parks replied in the negative. Murr then told Huckelby "who [Parks] was and how long he'd known [him] and asked if he had any problem dealing with [Parks.]" *Id.* Huckelby said that he did not. Afterwards, Huckelby and Parks "exchanged telephone numbers, beeper numbers and codes." Murr informed Parks that he would be delivering ten ounces of cocaine at a time to Huckelby at a price of $1,000 an ounce. Parks testified that, after this initial introduction, he regularly provided ten-ounce quantities of cocaine to Huckelby and received cash in return. The drugs were obtained by Murr and his associates by way of Kentucky, and were trnsported to co-defendant Diane Whited's residence in Knoxville for storage.

Parks' testimony was corroborated by information contained in one of the books seized from his residence when he was arrested for burglary in May of 1989. Parks confirmed that the book contained records of drug transactions that took place between April 10, 1989 and May 21, 1989. He had kept

similar records before that time, but Murr told him to destroy them "as soon as the drugs were paid for and out of our possession." According to Parks, ledger entries indicated that, on May 15, 1989, ten ounces of cocaine were distributed to Huckelby, who was referred to in the book as "Huck."

In addition, an address book taken from Parks' residence listed Huckelby's home, office, and beeper telephone numbers. Parks testified that he did, in fact, contact Huckelby by telephone between August 1988 and May 1989 regarding cocaine purchases. To buttress his testimony, the government introduced telephone records showing that, from August through November of 1988, as well from February through May of 1989, calls were placed on Murr-related telephones to Huckelby's office and beeper numbers. During the same periods, calls were made from Murr-related telephones to several of Huckelby's co-defendants.

Huckelby's conversation in the back of his jewelry store with Parks and Murr gave rise to the inference that he was well aware he was obtaining cocaine as part of a group venture. It demonstrated that he was not simply a street buyer engaging in a discrete transaction, but that he knew he was involved in an ongoing conspiracy of some dimension. That Murr told Parks that Huckelby was part of his drug distribution network, and the fact that Parks delivered significant quantities of cocaine to Huckelby at regular intervals, suggested that Huckelby indeed had such an understanding. *See United States* v. *Baker*, 905 F.2d 1100, 1106 (7th Cir.), *cert. denied*, 498 U.S. 876, 111 S.Ct. 206, 112 L.Ed.2d 167 (1990) (holding that, while mere buyer/seller relationship alone does not support conspiracy conviction, evidence of "repeat purchases or some other enduring arrangement that implies knowledge of the scope of the conspiracy" may suffice). His telephone records, as well as Parks' books, provided additional proof that Huckelby was caught up in the affairs of the charged conspiracy.

While some of this evidence was circumstantial in nature, even circumstantial evidence standing alone may sustain a conviction so long as the totality of the evidence was substan-

tial enough to establish guilt beyond a reasonable doubt. *See United States* v. *Green*, 548 F.2d 1261, 1266 (6th Cir.1977). We are satisfied that this standard was met and find there was sufficient evidence that Huckelby knew of, intended to join, and participated in the conspiracy.[1] He therefore assumed responsibility for every act committed to further its objectives which was reasonably forseeable. *See United States* v. *Martin*, 920 F.2d 345, 348 (6th Cir.1990).

With regard to Huckelby's violations of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, Parks described how he, Murr, and defendant Tommy McKeehan travelled to Kentucky every few weeks from September 1988 through May 1989 (the time frame of the counts upon which Huckelby was found guilty) to purchase cocaine from defendants Kenneth Lawson and Victor Rojas. Parks told the jury that the drugs sold to Huckelby were procured during these trips. The entries in Parks' books were consistent with his account of Huckelby's culpability, as were Huckelby's telephone records. Accordingly, the government showed that Huckelby, as a marketer of cocaine, "associate[d] himself" with the drug distribution ring and "[sought] by his acts to make is succeed." *Knox*, 839 F.2d at 294.

Huckelby nonetheless calls our attention to Parks' psychiatric history and his role as a government informant, apparently in an attempt to have us reassess his credibility. This we will not do. Credibility determinations are the province of the trier of fact, and are not to be disturbed on appeal when considering the sufficiency of the evidence underlying a defendant's conviction. Parks' alleged deficiencies as a witness were amply explored in the course of cross-examination.

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[1] Huckelby asserts that no evidence was adduced that he was present in the Eastern District of Kentucky during the life of the conspiracy. This, however, is of no moment. Venue lies in any district in which an overt act was committed in furtherance of the charged conspiracy. *See United States* v. *Turner*, 936 F.2d 221, 226 (6th Cir.1991).

III.

Diane Whited

A. Sufficiency of the Evidence

Whited was convicted of conspriacy to possess cocaine with the intent to distribute the drug (21 U.S.C. § 846), as well as on three counts of possession of cocaine, or aiding and abetting the possession of cocaine, with the intent to distribute (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2). The latter convictions were the result of conduct which occurred in September, October, and November of 1988. She challenges the sufficiency of the evidence sustaining the guilty verdicts returned against her.

At trial, Jerry Parks testified that defendant Robert Murr rented a house in the Martha Washington Heights subdivision in Knoxville, Tennessee, for Whited, who was his "girlfriend." Murr and Parks would store a large portion of the cocaine they bought in Kentucky there. In September of 1988, they went to the house for such a purpose. According to Parks, he and Murr

> went upstairs and took the cocaine into a bedroom, and [Murr] told Diane Whited to go into the other room and to get the stash. She was gone a few minutes. I heard her pull out an exit door in the hallway. She climbed up in the step, secured a green duffle bag, which had a padlock on it, and brought it into the bedroom. Mr. Murr had a key on his key ring. He opened up a lock on the duffle bag and pulled out two PVC pipes. We opened it up and put one of the kilos of cocaine in there. He told Ms. Whited to go into the kitchen or wherever she kept her bags and got baggies and roll of aluminum foil and brought back in the bedroom. Mr. Murr had a pair of scales there, digital scales, and we weighted the cocaine. We put [it] in one ounce bags, put green rubber bands around it, wrapped it up, put tinfoil around that, put it back in PVC pipes, secured the lids on it, put [it] back in

> the green duffle bag, locked that, put it back in the attic.

Parks recalled that it was Whited who took the cocaine and hid it in the attic.

Parks testified that he and Murr were "probably over" at the house with Whited "15, 20 times" through the fall of 1988. When questioned in greater detail, he confirmed that in September, October, and November of 1988, they brought cocaine "to the stash house, Diane Whited's stash house," where it was broken down in "pretty much the same manner" and later distributed.

In order for Parks to remove cocaine from the house to sell, he would have to call Murr "and make arrangements to meet him to go out to the house in Martha Washington Heights. . . . Sometimes Ms. Whited would be at home, sometimes she wouldn't." Parks was not allowed to go there by himself. He and Murr "would drive to the area. [Murr] would use his cellular phone. And if [Whited] was there, she would open the door"; otherwise, Murr would use his keys to enter the house. This arrangement became unworkable after November of 1988 because Parks needed easier access to the cocaine supply, and it was at this point the drugs were buried in a pipe on property behind Automotive Enterprises.

Gene Doss, A long-time resident of the Martha Washington Heights subdivision, testified that Murr and Whited called themselves "Don Stallings" and "Janet Stallings" during the time they spent there. Doss described the basement windows of Whited's house as "covered with some sort of material," as were the garage door, the entrance door, and a third door. There were fish-eye peepholes in the windows and the doors. He also remembered seeing a large safe being taken out of the residence.

Viewing the evidence in the light most favorable to the government, a rational jury could have concluded that Whited "knew of, intended to join and participated in the conspiracy." *Pearce*, 912 F.2d at 161 (quoting *United States* v. *Stanley*, 765 F.2d 1224, 1237 (5th Cir.1985)). She con-

sciously handled and concealed the cocaine stored at her residence, exercising dominion and control over the drugs. In fact, she was entrusted with their safekeeping for a number of months. Doss' testimony concerning Whited's alias and her home security measures further indicated that she was not merely associated with members of the drug distribution ring, but played an active role in the enterprise. Similarly, evidence was educed that she possessed at least a kilogram of cocaine on or about the dates set out in the counts upon which she was convicted. The intent to distribute could be inferred from such a large amount of drugs. *See, e.g, United States* v. *Welebir*, 498 F.2d 346 (4th Cir.1974).

B. Mistrial Based Upon Jerry Parks' Statements

Whited also argues that the district court should have granted defendants' motion for a mistrial following remarks made by Jerry Parks on cross-examination.

Parks was questioned by Robert Murr's counsel regarding the $35,000 to $40,000 he estimated he was paid by the government to compensate him for his services and his expenses. In explaining what the money was used for, and why he was uncertain whether his estimate was correct, he told the jury that

> [a] lot of this money, and I don't know whether it is listed here or not, is for my protection. I have been threatened by these witnesses. I have been threatened by the defendants and their wives. I have been threatened by several people. I actually recorded . . . [r]ecorded threats, who has a contract on me. I had to move. I had to get more money from the FBI. I don't know whether this represents all of it or not. I am telling you I spent a lot of their money. This is what they say I spent. I don't know whether this represents all of it or not. I am telling you I spent a lot of their money. This is what they say I spent. I don't know whether this is extra money, whether this represents every

> single nickel I got from the FBI. I spent a lot of money.

After Parks finished his statement, Murr's counsel did not raise an objection but continued his line of questioning.

At the close of the day's proceedings, defendant Mary Lawson's attorney moved for a mistrial on the basis of Parks' remarks concerning the threats he allegedly received from defendants and their spouses. The other defendants subsequently joined the motion. The district court replied:

> Now, in regard to Mr. Parks' response, it was in response to the cross-examination of him being paid all this money. The inference being raised to the jury, well, you know, that's a lot of walking around money, 35, $40,000. That's outrageous. Why would the Government be paying you all kinds of money like that for services and/or expenses? And I allowed him to defend himself. This was in response to cross-examination, direct response as to why it would take 35 or $40,000. and that's what he has to say. That's what he had to say. It may not be true. The jury may not believe it.
>
> But, Mr. Hicks, the books are full of cases where threats have been made, glaring, intimidating looks have been made in order to — and witnesses have been murdered, witnesses have been murdered. And that is — if that happens, it is competent, it is relevant, and the circuits have upheld that kind of testimony for as long as I can remember.
>
> So your motion for mistrial is overruled.

Lawson's counsel went on to express surprise that the district court would allow "bald assertion[s]" of threats and intimidation into evidence. The court, however, opined that it "allowed the testimony to come in for what it's worth. . . . It goes to the weight of the testimony and not its admissibility." When Lawson's counsel persisted in claiming that Parks' statements were unfounded, the court asked: "You want me

to have Mr. Parks go into it again tomorrow morning in more detail to see if there is a factual basis in front of this jury?" Lawson's counsel answered in the negative; instead, he wanted the jury admonished that Parks' "bald assertion that these defendants tried to kill him is not to be used as far as Mary Lawson is considered." The court refused, and also refused similar requests by the other defendants.

"A defendant may move for a mistrial where there is a legitimate claim of seriously prejudicial error," such that the defendant is unable to obtain a fair trial. *United States* v. *Moore*, 917 F.2d 215, 220 (6th Cir.1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1590, 113 L.Ed.2d 654 (1991). "The denial of a mistrial is generally within the discretion of the trial court," and our review of the court's ruling is confined to whether the trial court abused its discretion. *Id.*

Here, the government did not elicit the allegedly prejudicial statements and did not repeat them. *See, e.g., United States* v. *Tarantino*, 846 F.2d 1384, 1413 (D.C.Cir.1988). Significantly, defendants did not make a contemporaneous objection to the remarks on grounds of prejudice, or on any other grounds. As the district court pointed out, the remarks might not have been prejudicial at all. They were surely not what defendants wanted to hear, but they were offered as a legitimate response to a question concerning substantial payments to Parks by the government. The existence of these payments might well have damaged his credibility, if not justified to the jury's satisfaction. Parks' claim of threats was not wholly implausible on its face; such incidents have been known to occur. Defendants had an opportunity to challenge the veracity of the claim; they deliberately chose not to take up the cudgel. While certain statements are so prejudicial that the defense should not be required to rebut them, and the jury should not be left to weigh their value, we are convinced that the instant case did not involve such a situation.

We also note that, in the case at bar, the remarks at issue "constitute[d] but a small portion of the total testimony at trial." *United States* v. *Bowers*, 739 F.2d 1050, 1055 (6th Cir.), *cert. denied*, 469 U.S. 861, 105 S.Ct. 195, 83 L.Ed.2d

128 (1984). They were made well before the start of the jury's deliberations, deliberations which produced not guilty verdicts on several of the counts charged in the indictment. For all of these reasons, we hold that the district court did not abuse its discretion in denying defendants' mistrial motion.

C. Motion to Sever Defendant Kenneth Lawson

A motion was made by Robert Murr to sever defendant Kenneth Lawson prior to trial, when it appeared that Lawson would not be present for the proceedings. This motion was denied by the district court, and Whited contends that this was in error.

A district court's denial for severance is reversible only for an abuse of discretion. *United States* v. *Warner*, 690 F.2d 545, 552 (6th Cir.1982). "Once defendants have been properly joined under Federal Rule of Criminal Procedure 8(b), a 'strong showing of prejudice' is required to justify severance." *United States* v. *Hessling*, 845 F.2d 617, 619 (6th Cir.1988) (quoting *United States* v. *Reed*, 647 F.2d 678, 689 (6th Cir.), *cert. denied*, 454 U.S. 837, 102 S.Ct. 142, 70 L.Ed.2d 118 (1981)). The jury must be unable "to decide fairly and separately the guilt or innocence of each defendant." *Moore*, 917 F.2d at 220.

Whited argues that defendants were harmed because the jury might have inferred that Lawson did not show up for trial because he was guilty, and then concluded that his co-defendants must also be culpable. In addition, Whited asserts that they were prejudiced when the jury was exposed to extensive testimony concerning Lawson's activities, while "no one was there to challenge this testimony."

"As a general rule, persons jointly indicted should be tried together." *United States* v. *Stull*, 743 F.2d 439, 446 (6th Cir.1984). This is because there is almost always common evidence against the joined defendants that allows for the economy of a single trial. In the instant case, a large portion of the evidence presented, including that related to Lawson, was applicable to each defendant to show the scope of the

charged conspiracy. While Lawson was not there to "challenge" his alleged participation at trial, his co-defendants had the opportunity to convince the jury that they were not associated with him. "Absent a showing of substantial prejudice, spillover of evidence from one case to another does not require severance." *Moore*, 917 F.2d at 221 (relying upon *United States* v. *Gallo*, 763 F.2d 1504, 1526 (6th Cir.1985)). Defendants have not made such a showing here.

The fact that a defendant sought to escape prosecution is usually relevant in establishing culpability, so we understand Whited's anxiety about "transferred guilt" due to Lawson's flight. However, the district court neutralized any adversity Lawson may have caused his co-defendants by his actions. It gave a cautionary instruction that each defendant's case was to be considered separately and, further, that Lawson's flight could not be used as evidence against anyone but him. The jury appears to have heeded the court's admonition, as defendant William Baird, allegedly a close companion of Lawson's, was acquitted of conspiracy. Other defendants were acquitted on some of the distribution counts brought against them. Thus, the jury was plainly able to view them as distinct individuals in rendering its verdicts. As this was so, the district court did not abuse its discretion in denying the motion to sever Lawson.

D. The Government's Use of Prejudicial Evidence

Whited next contends that the government elicited, or sought to elicit, a variety of evidence that was prejudicial to defendants, thereby warranting reversal.

Specifically, she asserts that the government repeatedly sought to admit testimony related to meetings in Tennessee and Virginia where cocaine allegedly was obtained from Kenneth Lawson and Victor Rojas. As this evidence was never presented to the jury, defendants suffered no harm.

Whited also takes issue with the government being permitted to present testimony that cocaine was acquired by Jerry Parks from Robert Murr while Parks was living at a halfway

house in Bowling Green, Kentucky. The district court, however, allowed such evidence to establish the beginning of Parks' dealings with Murr. In our view, this was proper.

Additionally, Whited argues that the "defense was left helpless . . . to rebut the inflammatory nature" of Jerry Parks' testimony regarding threats allegedly made to him by defendants and their spouses. She seems to claim that the government should have either substantiated the allegations or sought to counteract their effect. We have already determined that reversal is not required as a result of Parks' statements.

Whited also complains that she and her co-defendants were harmed by the government's questioning of witness Ernie Nicely regarding loans allegedly extended to Robert Murr and his ex-wife, Judy, and promissory notes memorializing those loans. The district court struck Nicely's testimony on the basis of a pretrial ruling excluding such evidence. The trial judge cautioned the jury to disregard the testimony, and we believe that he cured any harm to defendants in doing so.

Finally, Whited contends that defendants were prejudiced both by statements from Nicely that Robert Murr was arrested on the same day he was seen with co-defendant Kenneth Lawson, and from witness Donald Bennett that Murr was incarcerated. However, the district court instructed the jury to disregard these remarks, which abated any prejudice.

E. Competency of Jerry Parks and Tommy McKeehan

Whited claims that witnesses Jerry Parks and Tommy McKeehan were incompetent to give testimony on grounds of mental incapacity. In the case of Parks, he had previously been found incompetent to stand trial, had a history of auditory delusions, and had spent time in mental health facilities. As for McKeehan, Whited cites an affidavit filed with the district court by his treating psychiatrist that he could not assist his counsel in an upcoming trial because he suffered from "confusion, agitation, paranoia and hallucinations." This affidavit was dated four days prior to McKeehan

having entered into a plea agreement with the government. Because of such information, Whited contends that, at the very least, it was error for the court not to conduct a preliminary examination of Parks' and McKeehan's competency as witnesses.

Under Rule 601 of the Federal Rules of Evidence (General Rule of Competency), "[e]very person is competent to be a witness except as otherwise provided in these rules." The Advisory Committee Notes to Rule 601 explain that "[t]his general ground-clearing eliminates all grounds of incompetency not specifically recognized in the rules of this Article." Accordingly, "[n]o mental or moral qualifications for testifying as a witness" are specified. *Id.* This is because "[s]tandards of mental capacity have proved elusive in actual application." *Id.*

Thus, the Federal Rules of Evidence strongly disfavor barring witnesses on competency grounds due to mental incapacity. As we wrote in *United States* v. *Ramirez*, 871 F.2d 582, 584 (6th Cir.), *cert. denied*, 493 U.S. 841, 110 S.Ct. 127, 107 L.Ed.2d 88 (1989):

> What must be remembered, and is often confused, is that "competency" is a matter of status not ability. Thus, the only two groups of persons specifically rendered incompetent as witnesses by the Federal Rules of Evidence are judges (Rule 605) and jurors (Rule 606). The authority of the court to control the admissibility of the testimony of persons so impaired in some manner that they cannot give meaningful testimony is to be found outside of Rule 601. For example, the judge always has the authority under Rule 403 to balance the probative value of testimony against its prejudicial effect. Similarly, under Rule 603, the inability of a witness to take or comprehend an oath or affirmation will allow the judge to exclude that person's testimony. An argument can also be constructed that a person might be impaired to the point that he would not be able to satisfy the "personal knowledge" requirement of Rule 602. Again though,

> it is important to remember that such decisions by a trial judge to either admit or exclude testimony will only be reversed for a clear abuse of discretion.

(Footnote omitted.)

The district court did not rule on Parks' competency before he took the stand; later, in considering a motion for judgment of acquittal, the court indicated that Parks and McKeehan "were not crazy witnesses." Likewise, it addressed the question of McKeehan's mental capacity during a bench conference held after he had begun to testify. The court stated that it had "observed Mr. McKeehan, and he appears to the Court to be sober, cogent. He appears to the Court to know exactly where he is and what he is doing. His testimony has been direct, and his testimony has not been confused." When pressed concerning the psychiatrist's affidavit that McKeehan could not help in his own defense, the court opined that "he sure has made a remarkable recovery . . . [His condition is] fodder for cross-examination, and it would appear that either the psychiatrist made an inaccurate diagnosis September the 5th or the witness has made a remarkable recovery. And the Court observes that — repeats that he does not appear to be confused today."

At a hearing on defendants' post-trial motions, the district court supplemented its findings regarding Parks' and McKeehan's competency, and the need for a special examination of their mental faculties. The court noted that

> one of the reasons I overlooked stating as to my belief that an independent evaluation at this time would be a waste of time is that — is that such a finding, even if they found that they were incompetent here in April of 1992, would not be dispositive as to their competence or mental state when they testified in September of 1991 at the trial of this case or at the hearings that we held in August.
>
> . . . .
>
> Similarly, even if I had such an opinion from a psychiatrist or psychologist or whoever that gave us an

> independent opinion that these people were — Mr. Parks and McKeehan were total screwballs, I would — I would find those opinions to have little probative value and of little weight, and I would not — I would not accept them as being — as being conclusive on the matter. And I would not let such opinions override my own judgment after having seen — personally witnessed their performance in court.

Hence, the district court did not find that Parks and McKeehan were incapable of understanding their oath and obligation to testify truthfully. Nor did the court find, based on its observations that their mental abilities were so limited that they did not have sufficient capacity to perceive events, to remember them, and to describe them for the benefit of the trier of fact. *See* Fed.R.Evid. 602. The court was not required, as Whited would have it, to conduct a special examination into their competency. If either Parks' or McKeehan's behavior raised concerns stemming from Rule 602 or 603, it could have excluded their testimony (or portions thereof) without any examination whatsoever. Furthermore, the court had the additional authority, pursuant to Rule 403, to exclude their testimony in light of their past or present mental state. The court chose not to take any of these measures in the circumstances. Instead, it permitted defense counsel to use the psychiatric records of Parks and McKeehan, as well as other indicia of their mental capacity, to vigorously attack their credibility.

After carefully reviewing the record, we conclude that the district court did not abuse its discretion in doing so. As long as a witness appreciates his duty to tell the truth, and is minimally capable of observing, recalling, and communicating events, his testimony should come in for whatever it is worth. It is then up to the opposing party to dispute the witness' powers of apprehension, which well may be impaired by mental illness or other factors. As we are persuaded that Parks and McKeehan were at least minimally capable of offering reliable evidence, the possible weaknesses in their

testimony went to its credibility, and so were to be assessed by the jury. *See United States* v. *Moreno*, 899 F.2d 465, 469 (6th Cir.1990).

Whited also argues that defendants should have been allowed to introduce the psychiatric records of Parks and McKeehan as substantive evidence. They were ruled inadmissible hearsay by the district court. Whited alleges, however, that they were not put forward for the truth of the matters asserted within, but to show how manipulative Parks and McKeehan could be if they were not, in fact, mentally unbalanced. Such use of the records during cross-examination to challenge Parks' and McKeehan's credibility was appropriate. However, we believe that they would have constituted hearsay if employed as part of a substantive defense. They would have to have been offered to show that the psychiatrists making the records *actually concluded* that Parks and McKeehan were mentally ill. Otherwise, Parks' and McKeehan's deception would have no basis in fact. Consequently, the district court did not err in declining to admit the psychiatric records.

F. Restriction on Cross-Examination of Government Agent

Finally, Whited asserts that the district court improperly limited defendants' cross-examination of a government witness, Special Agent Clyde Merryman of the FBI. Defense counsel sought to question Merryman about an internal disciplinary investigation that had been resolved in his favor. After a sealed hearing outside the presence of the jury, at which the court placed Merryman under oath and interrogated him about the alleged misconduct, it determined that defendants would be restricted from inquiring into the investigation on cross-examination. Having reviewed the transcript of the hearing and the sealed materials contained in the record, we conclude that the district court did not commit an abuse of its discretion in this regard.

Rule 608(b) of the Federal Rules of Evidence (Evidence of Character and Conduct of Witness — Specific instances of conduct) provides in part that

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may . . . in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

"The first step in a 608(b) analysis is whether the specific conduct is probative of the witness' character for truthfulness or untruthfulness." *United States* v. *Hill*, 550 F.Supp. 983, 990 (E.D.Pa. 1982), *aff'd*, 716 F.2d 893 (3rd Cir.1983), *cert. denied*, 464 U.S. 1039, 104 S.Ct. 699, 79 L.Ed.2d 165 (1984). Here, Merryman was not disciplined following the investigation into his conduct, so it had little worth as a challenge to his credibility. Whatever probative value might have attached to the FBI's proceedings was substantially outweighted by prejudice to the government. *See* Fed.R.Evid. 403.

IV.

Robert Phibbs

A. The Voir Dire

Phibbs argues that the district court violated Rule 24(a) of the Federal Rules of Criminal Procedure by refusing to submit a questionnaire developed by defendants to prospective jurors, when the court itself conducted the voir dire of the jury venire.

Except for Robert Murr, defendants waived their respective interests in examining the jury venire. According to Phibbs, the other defendants entrusted Murr with undertaking the voir dire to attempt to balance their right to an impartial jury with the district court's concern for expediency. Such a strategy appears to have been partially the result of defendants' fears that the court was leaning towards exclusively examining prospective jurors, and was an effort to devise an

alternative procedure more desirable to them. If so, their sense of the court's inclination proved to be accurate.

Rule 24(a) of the Federal Rules of Criminal Procedure (Trial Jurors — Examination) states:

> The court may permit the defendant or the defendant's attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or the defendant's attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

Thus, the trial court may resolve to conduct the voir dire on its own. If the court does so, it may also ask the jury venire other appropriate questions suggested by the parties.

In reviewing the district court's handling of the voir dire in the case at bar, we must ascertain whether the court "abused the broad discretion vested in him by the rulings of the Supreme Court of the United States in his impaneling of [the] jury." *United States* v. *Blanton*, 719 F.2d 815, 822 (6th Cir.1983), *cert. denied*, 465 U.S. 1099, 104 S.Ct. 1592, 80 L.Ed.2d 125 (1984). A trial court "retains great latitude in deciding what questions should be asked on voir dire." *Mu'Min* v. *Virginia*, __ U.S. __, __, 111 S.Ct. 1899, 1904, 114 L.Ed.2d 493 (1991). So long as the court ensured that the defendant or defendants had "a fair trial by a panel of impartial, 'indifferent' jurors", reversal is not mandated. *Irvin* v. *Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1960).

In its examination of the jury venire, the district court drew upon the substance of the questions presented by defense counsel. As the voir dire progressed, the court held bench conferences to address areas of concern highlighted by defendants. At its conclusion, the court asked whether there were any other questions from counsel, eliciting no response.

The district court examined the panel members as a group concerning the presumption of innocence, the meaning of "reasonable doubt," their knowledge of the parties and attorneys, and their knowledge of the case. They were also asked about their impressions of the criminal justice system, any predispositions they might have regarding drug prosecutions, whether any of them had prior experience as a juror, whether any of them had been a victim of crime, and whether they could set aside their personal feelings in rendering a verdict. All of these questions, and others, served to establish that the individuals who were ultimately selected as jurors were unbiased.[2]

Phibbs suggests that the written questionnaire created by defendants was necessary to ferret out those prospective jurors whose biases would not be revealed through a collective examination.[3] An individualized examination of the jury venire is not, however, required by the United States Constitution. *See Mu'Min*, __ U.S. at __, 111 S.Ct. at 1904. Much of the questionnaire was directed at the personal habits and activities of the panel members (e.g., what books they read, what television shows they watched, etc.). While such information might have aided defendants in identifying sympathetic jurors, it was not need to compose a fair-minded jury. Accordingly, we hold that the district court did not abuse its discretion in its management of the voir dire.

Phibbs claims nonetheless that considering the length of the trial was estimated at one month, "a one and one-half voir dire examination was so grossly inappropriate that a fair and impartial jury could not have been seated after such questioning." However, he does not cite any instance of prejudice relative to the jury as a body or to any specific juror. Nor does he point out any question that the court failed to ask that

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[2] In addition, the district court permitted defendants to utilize a total of 26 peremptory challenges.

[3] Each member of the jury venire did fill out the official juror's questionnaire form.

harmed defendants. As a result, we find his contention to be without merit.

B. The Presence of Government Agents in the Courtroom

Phibbs also asserts that defendants did not receive a fair trial because FBI Special Agent Clyde Merryman and DEA Special Agent Frank Finken, both of whom appeared as witnesses, were allowed to remain in the courtroom throughout the proceedings.

Rule 615 of the Federal Rules of Evidence (Exclusion of Witnesses) provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. The rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

In the instant case, the government sought to designate both Merryman and Finken as its representatives during the trial. After a defense objection, the district court replied:

> I think the rule provides that anyone that was necessary to assist counsel in the presentation of the case would be—would be permitted to remain in the courtroom. Inasmuch as this is an extended trial, boxes of documents both from the Eastern District of Kentucky and the Eastern District [of] Tennessee, it would be unduly burdensome on the Court and time consuming if we just had one case agent. So the request of the Government is not unreasonable, so the motion is overruled.

The court then engaged in a colloquy with one of the counsel for the defense, inviting him to bring contrary authority to its

attention before any witnesses were called. Counsel did not do so.

Hence, the court initially treated both Merryman and Finken as "essential" witnesses under Rule 615(3). Later, however, the court requested that the government designate one of the two as its representative pursuant to Rule 615(2); it would then consider whether the other agent was an "essential" witness. The government responded by selecting Merryman as its representative, and the court found that Finken's presence in the courtroom was also needed for the government to effectively present its case.

Phibbs concedes that one of the agents could have stayed in the courtroom, despite the fact that he would later testify. However, he argues that the government had the burden to show that the presence of more than one agent was "essential" to it laying out its case. *See* Fed.R.Evid. 615.

The district court followed our procedure, as set out in *United States* v. *Pulley*, 922 F.2d 1283 (6th Cir.), *cert. denied*, *Pulley* v. *United States*, __ U.S. __, 112 S.Ct. 67, 116 L.Ed.2d 42 (1991), to be used when the government seeks to have two agent-witnesses in the courtroom for assistance. Rule 615(2) affords the government the right to designate only one representative for such a purpose. *Id.* at 1286. However, certain prosecutions may be complex enough that the aid of more than one law enforcement officer is needed to sort through extensive, technical evidence, and to help "map out strategy." *See United States* v. *Martin*, 920 F.2d 393, 397 (6th Cir. 1990). When the government wants to have two agent-witnesses in attendance throughout a trial, "it is always free to designate one agent as its representative under subpart (2) [to Rule 615] and to try to show under subpart (3) that the presence of the second agent is "essential" to the presentation of its case." *Pulley*, 922 F.2d at 1286.

Demonstrating that an additional agent[4] is, in fact, "essential" is no easy task. Criminal defendants, as do all persons

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[4] Unlike Fed.R.Evid. 615(2), Rule 615(3) does not restrict the number of witnesses who may be deemed "essential to the presentation of [a] party's cause."

caught up in the legal process, have a substantial interest in "discouraging and exposing fabrication, inaccuracy, and collusion" related to in-court testimony. Advisory Committee Notes to Fed.R.Evid. 615. This interest was recognized in the text of Rule 615, which made the exclusion of witnesses by the parties a matter of right, subject to exceptions that are narrowly defined.

The "essential" witness exception set out in Rule 615(3) "contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation." Advisory Committee Notes to Fed.R.Evid. 615. We are persuaded that Finken fell within this category due to the particular circumstances of the case at bar. This was a trial that was scheduled for approximately one month, involving several defendants and a great deal of evidence, not all of which was readily accessible. After Merryman was designated the government's representative in accordance with Rule 615(2), the court determined that Finken, who was intimately familiar with portions of the evidence, was also needed to advise the government in its handling of the prosecution. As Merryman and Finken were, for the most part, responsible for distinct aspects[5] of a far-flung investigation, this was not an abuse of discretion.

We note that the district court took steps to guarantee that Merryman and Finken would not parrot each other's testimony. It directed that, when one of them was on the stand, the other was to be outside the courtroom. Such a measure could be taken, not only on the basis of the court's inherent powers of trial oversight, but also in reliance upon Rule 615 itself. *See, e.g., United States* v. *Womack*, 654 F.2d 1034 (5th Cir. 1981), *cert denied*, 454 U.S. 1156, 102 S.Ct. 1029, 71 L.Ed.2d 314 (1982) (breach of conditions placed on sequestration constitutes violation of Fed.R.Evid. 615).

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[5] Finken was the case agent in Kentucky, while Merryman was stationed in Tennessee.

Phibbs, however, asserts that government counsel really wanted Finken and Merryman in court so that they might be in a position to coach Parks during recesses, or to otherwise guide his testimony. He claims that defendants were prejudiced because Merryman had substantial contact with Parks, "and the clear purpose and effect of allowing Agent Merryman to remain in the courtroom was to be able to listen to all of the testimony and to, in fact, cumulatively correct any questionable credibility problems and to bolster the credibility of Mr. Parks[.]" As for Finken, he "also had the opportunity to sit through this testimony and assist Agent Merryman in the 'correction' of Mr. Parks' testimony." Phibbs offers nothing to support his charges, and we find them to be rank speculation.

Despite the possibility of improper influence, Rule 615(2) allows the government to have any law enforcement officer it wants at its counsel table. Similarly, Rule 615(3) does not categorically bar any class of agents from assuming "essential" witness status. Ordinarily, if there are concerns about coaching by an agent-witness, the court may order him not to discuss the case with any other witness. If the agent fails to adhere to such an order, the court has a variety of remedies at its disposal, ranging from commenting on the transgression to the jury, to holding the agent in contempt, or disqualifying him as a witness, or even declaring a mistrial.

In addition, the defense is free to cross-examine both the agent-witness and the alleged object of his coaching efforts, subject to the control of the court. *See Geders* v. *United States*, 425 U.S. 80, 89-91, 96 S.Ct. 1330, 1335-36, 47 L.Ed.2d 592 (1976). *See also* M. Graham, Federal Practice and Procedure: Evidence § 6611 at 217-221 (West 1992). Here, defendants engaged in spirited cross-examination of Parks, Merryman, and Finken, touching upon the question of coaching.

C. Sufficienty of the Evidence

Phibbs next contends that the evidence underlying his convictions was insufficient, and that the district court erred in

denying both his motion for a directed verdict following the government's case-in-chief, and his subsequent motion for judgment of acquittal.

Phibbs was convicted of conspiracy to possess cocaine with the intent to distribute the drug (21 U.S.C. § 846), as well as on nine counts of possession of cocaine, or aiding and abetting the possession of cocaine, with the intent to distribute (21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2).

Jerry Parks testified that Phibbs, an employee of Robert Murr's, wrote a letter to the United States Probation Office in Memphis, Tennessee, stating that he would employ Parks if he was transferred to Knoxville. Phibbs sent the letter on behalf of Murr because Murr was under investigaton by authorities in Knoxville. Their efforts were successful, and Parks was given permission to work for Automotive Enterprises, one of Murr's companies. After Parks began his tenure there, Phibbs represented to Parks' probation officer that he was on the job. However, according to Parks, his employment was a "sham" and "[he] didn't do anything there at Automotive Enterpriese other than carrying on Mr. Murr, the Chief's, cocaine business." Phibbs sometimes paid Parks with "sham" checks, which he would then cash, returning the money to Phibbs to put back in the account.

After Parks began supplying Murr's cocaine customers with the drug, he often gave Phibbs the money he collected from them if Murr was unavailable. This was done on Murr's express instructions, so that Parks would not be carrying large sums on his person. The amount turned over to Phibbs would frequently be in the neighborhood of $10,000 to $15,000.

When, after November of 1988, Murr decided to move the location of the cocaine stash from the house he rented for defendant Diane Whited, he told Parks to bury the drugs inside a pipe on a hillside behind Automotive Enterprises. Parks testified that the only other person "in the world" who knew where the cocaine was subsequently hidden was Phibbs. This was so that, in the event Parks was arrested or injured, "somebody in our organization . . . would know."

Ernie Nicely, a business partner of Murr's, stated that on two occasions when defendant Kenneth Lawson came to see Murr at Anderson County Auto Auction, ostensibly to discuss matters related to the cocaine conspiracy, Phibbs was "on the property." This was unusual because "[h]e very seldom came out there"; it was 20 miles away from Phibbs' job at Automotive Enterprises. On the last day that Nicely saw Lawson, August 17, 1989, Murr called him and asked him to take two suitcases out of the safe at Anderson County Auto Auction and to deliver them to Phibbs at Automotive Enterprises.

Later, in September of 1989, Murr told Nicely that defendant Edward Rogers owed him $2,000, and that Phibbs was to deduct that amount from the $10,000 that he was holding for Rogers. According to Nicely, Rogers owed the money "for drugs or something." Around that time, Murr instructed Nicely to "get rid of" a 1984 Porsche 940 that was on Murr's property until he could get a title for it. Phibbs informed him that Murr had obtained the car in exchange for a kilogram of cocaine. When he titled the Porsche in his own name, Phibbs furnished the money to pay the tax.

Rogers' statements at trial corroborated those of Parks and Nicely regarding Phibbs' participation in the drug distribution ring. He confirmed that he owed Murr $2,000 for drugs, and that he went to Phibbs to settle his account. Phibbs claimed that he actually owed $4,000 for four ounces of cocaine. During their conversation, Rogers asked Phibbs if he was "still in business," and Phibbs replied in the affirmative.

All of this testimony was buttressed by the government's introduction of records demonstrating that calls were made from Murr-related telephones to Phibbs' residence, his beeper, or to Whited's cellular phone, which was listed in his name, during the periods delineated in the distribution counts.

Viewing the evidence in the light most favorable to the government, there was sufficient proof from several sources that Phibbs "knew of, intended to join and participated in"

the charged conspiracy. *Pearce*, 912 F.2d at 161 (6th Cir.1990) (quoting *United States* v. *Stanley*, 765 F.2d 1224, 1237 (5th Cir.1985)). He received and processed drug money, helped install Parks as a middleman, and was part of the security surrounding the cocaine stash. As for the distribution counts, Parks' testimony, in particular, indicated that Phibbs handled drug money during the relevant time frames. His contention must therefore be rejected.

D. "Minimal" v. "Minor" Participation; Acceptance of Responsibility

Phibbs further argues that, at sentencing the district court should have accorded him a four-point reduction in offense level, attendant to a finding that he was a "minimal" participant in the drug ring, rather than a two-point reduction for being a "minor" participant. He also asserts that he was entitled to a two-point reduction for acceptance of responsibility.[6]

A district court's facutal decisions, such as those related to a defendant's acceptance of responsibility, or his role in the offense, are reviewed under the clearly erroneous standard. *United States* v. *Perry*, 908 F.2d 56, 58 (6th Cir.1990). To be clearly erroneous, " 'a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.' " *Id.* (quoting *Parts and Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir.1988), *cert. denied*, 493 U.S. 847, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989)).

Application Note 1 to United States Sentencing Guidelines § 3B1.2 (Mitigating Role) states in part that: "Subsection (a)

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[6] Since all appropriate arguments of one defendant have been adopted by the other defendants, the government assumes that Huckelby and Whited joined in Phibbs' argument concerning acceptance of responsibility, and that Huckelby joined in his argument regarding a sentence reduction for minimal participation in concernted activity. We do not make such an assumption, since these issues are largely fact-specific and are not common to the group.

[dealing with minimal participants] applies to a defendant who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." With this language in mind, Phibbs latches onto the probation officer's conclusion in his presentence report that "Phibbs gives the appearance, amid all of the co-defendants to be least involved in the group" to contend that he should have been considered a minimal participant. He further claims, in this regard, that he did not have "organizational, managerial or monetary interests in any of the trips to Kentucky to buy cocaine."

However, Application Note 2 to U.S.S.G. § 3B1.2 underscores that:

> It is intended that the downward adjustment for a minimal participant will be used infrequently. It would be appropriate, for example, for someone who played no other role in a very large drug smuggling operation than to offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs.

The district court, in passing sentence, felt that Phibbs was not merely on the fringes of the drug distribution ring:

> You knew what the deal was, you knew what the deal was from beginning to end. And I really believe that and I infer you were into it deeper than what the United States was able to prove. The ostrich defense is not applicable in cases like this.

In comparing the roles of Whited, whom it considered to be a minimal participant, and Phibbs, the court took Whited's dependence on Murr and the fact that, unlike Phibbs, she was not a repository of drug money to be significant. In its view, these factors placed her "below Phibbs" for sentencing purposes.

Our examination of the record convinces us that Phibbs was not the sort of marginal player that the United States Sentencing Commission and Congress conceived of as a minimal participant. He was involved in the drug distribution ring throughout the bulk of its existence having been entrusted with drug-related funds, as well as critical knowledge concerning the whereabouts of the cocaine supply. Consequently, the district court's conclusion as to his role in the enterprise was not clearly erroneous.

Phibbs further contends that he should have been granted a reduction in offense level for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1. In a statement furnished to the district court, Phibbs acknowledged that he was aware, or should have been aware, that he was given money that was the product of Murr's cocaine deals. Once Murr was arrested, it became clear to him that the money was, in fact, drug-related. Thus Phibbs avers that he "truthfully admitte[d] the conduct comprising the offense(s) of conviction." Application Note 1(a) to U.S.S.G. § 3E1.1.

However, the district court was not so sure. It told Phibbs' counsel that "I have read his statement, and I don't think that the statement even comes close to a contrite heart and acceptance of responsibility." Accordingly, the court denied Phibbs' request for a sentence reduction under U.S.S.G. § 3E1.1.

We approve of the court's decision. Phibbs did not even begin to address the scope of the charges on which he was convicted. To the extent that he did, he did not do so in good faith. There was evidence that he understood all along he was collecting tainted money, and that he was enlightened with respect to the magnitude of the drug distribution ring. Rogers' testimony indicated that he continued his criminal conduct after Murr was arrested. In no way did he assist law enforcement authorities in their probe of the ring's activities. Hence Phibbs could not be said to have accepted responsibility for his offenses in a manner contemplated by the federal sentencing guidelines.

V.

Victor Rojas

A. The Government's Use of Grand Jury and Administrative Subpoenas

Rojas contends that the district court erred in allowing the government to employ administrative subpoenas to uncover evidence without a finding of probable cause that a crime had taken place. He also claims that the government abused the grand jury subpoena power by using it to gather additional evidence in support of the previously-returned indictment.

After Rojas was arrested on January 9, 1991, he was informed that a sealed indictment had been returned against him on May 2, 1990. His counsel filed motions for discovery and inspection, and received materials including Rojas' telephone records, and those of defendants Kenneth Lawson and Mary Lawson. These records had been subpoenaed after the May 1990 indictment. In addition, his attorney was provided with Rojas' credit card statements, subpoenaed on January 17, 1991, defendant William Baird's telephone records, ordered subpoenaed on June 19, 1990, as well as other items.

Rojas subsequently moved to dismiss the indictment based upon the government's alleged abuse of the grand jury subpoena power. He argued that the government improperly utilized this power to obtain materials to supplement the indictment already handed down. The district court denied Rojas' motion after a hearing at which the government represented that the materials in question were secured by way of DEA administrative subpoenas, not grand jury subpoenas.[7] At trial, Rojas, joined by his co-defendants, objected to such subpoenas having been being employed without a demonstration of probable cause before a neutral magistrate.

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[7] Our review of the record confirms that the subpoenas in controversy were, indeed, administrative subpoenas. Accordingly, we need not address Rojas' grand jury-related argument.

Pursuant to 21 U.S.C. § 876(a) (Subpoenas—Authorization of use by Attorney General):

> In any investigation relating to his functions under this subchapter with respect to controlled substances . . . the Attorney General may subpena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation.

The Attorney General may delegate this power to special agents in charge of those criminal investigations covered by the statute. *United States* v. *Hossbach*, 518 F.Supp. 759, 765-66 (E.D.Pa.1980) (citing 28 C.F.R. Subpart R, Appendix § 7(a)). The sorts of items that are capable of being procured as a result plainly include the records presently in controversy. *Id.* at 767 (telephone records); *United States* v. *Mountain States Tel. & Tel. Co.*, 516 F.Supp. 225 (D.Wyo.1981) (telephone records).

Once a targeted individual has been indicted, the government must cease its use of the grand jury in preparing its case for trial. *United States* v. *Breitkreutz*, 977 F.2d 214, 217 (6th Cir.1992). It may, however, continue to employ the grand jury process as part of an ongoing investigation, possibly leading to further charges against the subject of the former indictment. *Id.* Section 876 of title 21 simply furnishes the Attorney General and his delegates with an alternative mechanism for carrying on the investigation. However, unlike the grand jury system, it may also be used to discover evidence related to the charges in the original indictment.[8]

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[8] It is also distinct from Rule 17(c) of the Federal Rules of Criminal Procedure (Subpoena—For Production of Documentary Evidence and of Objects).

Recipients of administrative subpoenas, such as those issued in accordance with 21 U.S.C. § 876, are afforded certain protections under the Fourth Amendment to the United States Constitution. The subpoena has to be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance [would] not be unreasonable." *See* v. *City of Seattle*, 387 U.S. 541, 544, 87 S.Ct. 1737, 1740, 18 L.Ed.2d 943 (1967).

If it is a subpoena duces tecum, the government does not have to secure a judicial warrant before service is effectuated. Nonetheless, "the subpoenaed party [must be able to] obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." *Id.* at 545, 87 S.Ct. at 1740. *See also Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408, 415, 104 S.Ct. 769, 773, 78 L.Ed.2d 567 (1984).

Should an on-premises search and inspection be required to execute the subpoena, a valid search warrant is needed as a condition precedent if consent is not forthcoming. If, as in the instant case, the subpoena is to be based upon 21 U.S.C. § 876, "and the purpose behind the search [is] . . . a quest for evidence to be used in a criminal prosecution," a full probable cause showing is mandatory.[9] *United States* v. *Lawson*, 502 F.Supp. 158, 165 (D.Md.1980). *See also Michigan* v. *Tyler*, 436 U.S. 499, 508, 512, 98 S.Ct. 1942, 1949, 1951, 56 L.Ed.2d 486 (1978). A showing which only comports with "reasonable legislative or administrative standards", as when regulatory noncompliance is suspected, will not suffice. *See Camara* v. *Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1735, 18 L.Ed.2d 930 (1967). *See also Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 320, 98 S.Ct. 1816, 1824, 56 L.Ed.2d 305 (1978) ("Probable cause in the criminal sense is not required" to undertake administrative search aimed at

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[9] In such a context, the reasonableness of giving the warrant without advance notice to the subject and an opportunity to be heard is to be analyzed consistent with those Fourth Amendment principles applicable to criminal warrants.

uncovering civil violations of the Occupational Health and Safety Act).

Here, the administrative subpoenas were not directed at Rojas, but rather at third party businesses. As a consequence, he did not have standing to dispute their issuance on Fourth Amendment grounds, unless he could demonstrate that he had a legitimate expectation of privacy attaching to the records obtained. *See, e.g., United States* v. *Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is evident, however, that Rojas did not have both an acutal and a justifiable privacy interest in any of these materials, including his credit card statements and telephone records. *See Smith* v. *Maryland*, 442 U.S. 735, 742, 99 S.Ct. 2577, 2581, 61 L.Ed.2d 220 (1979) (in case involving pen register, the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial"); *United States* v. *Miller*, 425 U.S. 435, 440-41, 96 S.Ct. 1619, 1623, 48 L.Ed.2d 71 (1976) (records of bank transactions were not "private papers," over which a person could claim ownership or possession, but were business records). The information contained within them was readily accessible to employees during the normal course of business. Rojas therefore lacked standing to challenge the government's use of the subpoenas.[10]

The situation would not have been different if the government had infringed upon the constitutional rights of those entities subpoenaed. One generally does not have standing to complain about the breach of another's rights. *See, e.g., Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). As it happened, none of the parties subpoenaed was opposed to turning over the requested items.

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[10] Rojas' co-defendants were likewise devoid of standing.

B. Motion in Limine Related to Rojas' Colombian Origins; Motion For Mistrial Based Upon References to Rojas' Colomibian Ties

Rojas further asserts that the district court should have granted his motion in limine to prohibit the government from mentioning his having been born in Colombia, or from introducing his passport records, which revealed that he had journeyed to Colombia several times, ostensibly to visit relatives, in the three to five years prior to his arrest.[11]

Rojas also argues that a mistrial was warranted because of inflammatory references that were made concerning his connections to Colombia. In his view, they were gratuitous and were designated both to arouse ethnic bias and to tap into the jury's presumed eagerness to combat the national drug crisis, including by way of a misguided verdict. *See United States* v. *Solivan*, 937 F.2d 1146, 1153-54 (6th Cir.1991) (urging jury to "strike a blow to the drug problem" was "harmful to the constitutional right to a fair trial"); *United States* v. *Doe*, 903 F.2d 16, 25 (D.C.Cir. 1990) (appeals to racial passion affected jury impartiality). He cites three such references aside from those adverted to regarding his motion in limine.

First, the government was allowed to call a federal prisoner, Andres Tealdo, as a witness and to ask him leading questions. This led Tealdo to testify that he knew Rojas in 1989, and that Rojas told him that he sold cocaine from Colombia. Second, the government stated during its closing argument that "Robert Dale Murr could pick up a telephone and arrange for his cocaine broker, the Defendant Kenneth Lawson, to have a Columbian drug dealer, Victor Rojas, bring him kilogram quantities of cocaine by Kentucky by a phone call." Lastly, on cross-examination, Jerry Parks referred to Rojas on one occasion as "Victor Manuel Noriega Rojas." While not a direct reference to this background Rojas claims that, by implication, it drew attention to his ties to Colombia, a country commonly understood to be a hub in the international drug trade.

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[11] At the time of his arrest, Rojas was a legal alien residing in New Jersey.

Motions in limine to exclude evidence are reviewed for an abuse of discretion. We detect no such abuse in the instant case. That Rojas had ties to Colombia and travelled there frequently was relevant to the government's contention that he was the cocaine supplier in the charged conspiracy. We believe that, as proffered for such a legitimate purpose, the complained-about evidence was not unduly prejudicial. *See* Fed.R.Evid. 403.

The denial of a mistrial motion is also assessed under the abuse of discretion standard. *Moore*, 917 F.2d at 220. Before Tealdo took the stand, the district court and counsel held a lengthy bench conference, during which they discussed the implications of his anticipated evidence. The government expected that Tealdo's testimony would be that Rojas admitted to him that he was a drug dealer whose cocaine source was in Colombia. Significantly, defense counsel objected only on the grounds that this would constitute irrelevant and prejudicial evidence of other "bad acts," relying upon Rule 404(b) of the Federal Rules of Evidence. We are of the opinion that it was properly allowed in and was not, in fact, inflammatory. As a consequence, the portion of the government's closing argument about which Rojas complains had a basis in evidence.

As for Parks' calling him "Victor Manuel Noriega Rojas," Rojas suggests that this was harmful because General Noriega's highly-publicized drug trial was underway in Florida at the same time as the instant proceedings. While such a reference was inappropriate, it was an isolated remark and we are satisfied that it did not deprive him of a fair trial. *See Bowers*, 739 F.2d at 1055. Accordingly, the district court did not err in denying Rojas' motion for a mistrial.

C. The Rojas "Photospread"

Rojas also alleges that only after the government's examination of witness Vivian Cummins did he first become aware that she had been shown a "photospread" containing his picture as part of her pretrial identification of him. He contends that this violated his right under *Brady* v. *Maryland*, 373 U.S.

83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and its progeny to any exclupatory or impeachment evidence held by the government.

The record indicates that Rojas did request such so-called "*Brady* evidence" in the proper fashion. At side bar, the goverment averred that defense counsel had been provided with a copy of the photospread "before Ms. Cummins even hit the stand." Whether this was so, we are persuaded that Cummins had a sufficient basis for her pretrial identification of Rojas, independent from any refreshment provided by the photospread. As a result, Rojas' timely mistrial motion need not have been granted.

D. The Confidential Presentence Information

Rojas, on behalf of his co-defendants, next asserts that the district court erred in allowing confidential presentence information to be submitted by the United States Probation Office without affording him an inspection of the materials, and an opportunity to comment as to their import.

At a hearing where sentencing matters were discussed, defense counsel asked whether the district judge had any confidential presentence information in his possession. The judge indicated that he did, but maintained that it was not the sort of material he was obligated to divulge:

> [A]ny information that I may get, directly indirectly, from the probation officer independent of the presentence report of a confidential nature . . . is solely—if any information that I received from the probation office, directly or indirectly, is for my illumination and my consideration, and it would not be of any—any use or benefit to you or the defendant at all. And that information is exempt.

The district judge then overruled counsel's motion, made in accordance with Rule 32(c)(3)(B) of the Federal Rules of Criminal Procedure, for a summary of the confidential information.

The information in question was placed under seal, and we examined it. It consisted of nothing more than the probation officer's sentencing recommendations concerning defendants. Pursuant to Fed.R.Crim.P. 32(c)(3)(A), such recommendations are not required to be disclosed to the accused. Consequently, the district court did not withhold any sentencing information that defendants were entitled to examine.

E. Acceptance of Responsibility

Finally Rojas argues that he should have been given a two-point reduction in offense level under the federal sentencing guidelines for acceptance of responsibility. Rojas asserts that he offered to plead guilty and to acknowledge that he conspired to distribute, and did distribute, the amount of cocaine charged in the indictment. However, according to his attorney, there was a dispute with the government "over Mr. Rojas' remembrance or memory of what quantities came down here on a certain date, and Mr. Parks and Mr. McKeehan's memory." As a result, the government would not enter into a plea agreement with Rojas, and he subsequently went to trial.

Rojas claims that, in spite of his desire to admit his wrongdoing, his offense level was not lowered because he did not, in fact, plead guilty. Consequently, he contends that he was penalized for exercising his right to a trial as guaranteed by the Sixth Amendment to the United States Constitution.

Section 3E1.1 of the sentencing guidelines (Acceptance of Responsibility) does not inflict an across-the-board penalty upon those defendants who go to court to contest their prosecution. Application Note 2 to the section plainly provides that:

> Conviction by trial . . . does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his con-

> stitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

It is well-established that a penal scheme which extends a benefit to defendants who own up to their conduct does not unconstitutionally burden those who exhibit no remorse. *See, e.g., Brady* v. *United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). A plea of guilty is an indication of contrition, so it is not surprising that "leniency is more often granted to defendants who accept responsibility by pleading guilty." *United States* v. *Saunders*, 973 F.2d 1354, 1362 (7th Cir.1991), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1026, 122 L.Ed.2d 171 (1993).

The record reveals that Rojas' acceptance of responsibility was not unconditional; he was keenly interested in securing a plea agreement. Rajas' counsel stated explicitly that "because of my understanding that the United States cannot give him any assurance that he will not be prosecuted in any other district, then he is not pleading guilty . . . I want to state on the record that he is willing to plea, except for the Government said they would not promise to prosecute him in any other districts." He also complained that the government "[was] not willing to cut [Rojas] one iota" as part of a bargain because, in his view, Rojas' testimony might not resonate with that of Parks and McKeehan, Notwithstanding Rojas' equivocation, the district judge told him that he would "take . . . into account" his alleged readiness to concede his culpability. The court need not have done so; that it did demonstrates that its failure to give Rojas an offense level reduction under section 3E1.1 was not punishment for his having stood trial.

However, the court ultimately felt that Rojas' refusal to testify against his co-defendants, which may have resulted in the acquittal of one of them, and to adequately divulge information about his superiors in his cocaine supply network was significant. The district court's findings concerning a defendant's acceptance of responsibility for his offense are not to be reversed unless clearly erroneous. *Perry*, 908 F.2d at 58. "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review." Application Note 5 to U.S.S.G. § 3E1.1. Applying such a standard here, we do not believe the district court's particular conclusion as to Rojas was improper.[12]

VI.

Robert Murr

A. The Plea Agreement

Murr claims that his convictions should have been dismissed by the district court because he had entered into an earlier plea agreement with the government in the Eastern District of Tennessee. Murr contends that the terms of this agreement precluded his prosecution in the case at bar.

On August, 17, 1989, Murr was arrested in Knoxville, Tennessee, and was later indicted for cocaine distribution and for using a telephonic device to facilitate such distribution. In January of 1990, Murr agreed in writing to plead guilty to the distribution charges in exchange for the government moving to drop the remaining counts of the indictment at sentencing. The agreement provided in part that:

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[12] Although Rojas has joined in the arguments of the other defendants, we do not consider Rojas to have challenged the sufficiency of the evidence supporting his convictons. Such a contention is generally unique to any given defendant. As it is not our function to craft an appellant's arguments, he may not simply "join" the briefs of his co-defendants on this issue.

> If the defendant complies with the terms of this agreement, the United States will not further charge the defendant in the Eastern District of Tennessee for those non-tax-related offenses of which it presently has knowledge. It is further agreed that the defendant will not be prosecuted in the Northern District of Georgia for any non-tax-related offenses concerning actions involving Bobby Joe Wilson.

The last paragraph of the agreement underscored that:

> The Parties further agree that this plea agreement constitutes the full and complete agreement and understanding between the parties concerning the defendant's guilt to the above-referenced charges, and that there are no other agreements, promises, undertakings or understandings between the defendant and the United States.

In his motion for dismissal, Murr asserted that the promise that he would not be prosecuted in the Eastern District of Tennessee or in the Northern District of Georgia was actually meant to signify a global resolution of his criminal exposure. He based this assertion on purported representations by government counsel to this effect. Furthermore, according to Murr, it was logical that such was the intention of the parties because the only investigations of his activities known to be underway were in those districts. His counsel supposed that it would not have been reasonable for him to demand that the United States Attorney contact every jurisdiction in which Murr's conduct might possibly be under scrutiny.

The district court, however, rejected these arguments. It held that, on its face, Murr's plea agreement did not restrict the government from trying him in the Eastern District of Kentucky on the instant indictment. Its finding is subject to the clearly erroneous standard of review. *See United States* v. *Robison*, 924 F.2d 612, 614 (6th Cir.1991).

In determining whether a plea agreement has been broken, "the trial court should look to what the defendant reasonably

understood" when he entered into the agreement. *United States* v. *Herrera*, 928 F.2d 769, 771 (6th Cir.1991). However,

> [i]t is impossible for a trial judge to properly administer a plea agreement if it consists of secret terms known only to the parties. Furthermore, "a plea bargain itself is contractual in nature and 'subject to contract-law standards.' " . . . [W]here Rule 11 procedures were fully adequate, absent extraordinary circumstances, or some explanation of why defendant did not reveal other terms, at least when specifically asked to do so by the court, a defendant's plea agreement consists of the terms revealed in open court[.]

Baker v. *United States*, 781 F.2d 85, 90 (6th Cir.), *cert. denied*, 479 U.S. 1017, 107 S.Ct. 667, 93 L.Ed.2d 719 (1986) (citations omitted). Hence, as the district court observed, the most persuasive evidence of what a defendant reasonably appreciated as his bargain is found in the plain language of the court-approved agreement.

Here, Murr participated in intensive negotiations with the government over a possible plea bargain. He was invited to advise the government of other districts in which he required protection from prosecution so that they might be considered for inclusion in any agreement. In response, Murr raised concerns about his criminal liability in the Northern District of Florida, as well as in the Eastern District of Tennessee and the Northern District of Georgia. However, the ultimate product of the negotiations only contained an agreement not to prosecute him in the latter two venues. This promise was kept.[13] *See United States* v. *Turner*, 936 F.2d 221, 225 (6th Cir.1991) (United States Attorney's grant of "criminal im-

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[13] It may have been nothing more than good fortune for Murr that this was so. "[I]t is unclear that a United States Attorney in one judicial district has the power to bind another United States Attorney in another judicial district." *United States* v. *Turner*, 936 F.2d 221, 225-26 (6th Cir.1991).

munity" within the Southern District of Florida did not bar prosecution in the Eastern District of Michigan).

Nurr expressly acknowledged that the plea agreement he struck "constitute[d] the *full and complete agreement* and understanding between the parties concerning the defendant's guilt to the above-referenced charges, and that there are *no other agreements*, promises, undertakings or *understandings* between the defendant and the United States." (Emphasis added.) In doing so, we are satisfieds that he comprehended the terms of the agreement. Thus, the district court did not err in finding that they had not been breached.

Nonetheless, Murr insisted to the district court that he was lulled by the government into "letting sleeping dogs lie" with regard to other judicial districts where he might be criminally liable. Murr maintained that the government knew or should have known that charges against him were being prepared in the Eastern District of Kentucky. It then "sandbagged" him into not seeking a no-prosecution provision in his plea agreement pertaining to that venue.

The district court did not accept Murr's characterization of events. It concluded tht the government, and specifically the Assistant United States Attorney who was negotiating with Murr, was unaware of his drug operation reaching into Kentucky until Jerry Parks was debriefed in late February of 1990. The record bears out such a conclusion, as does common sense. It is most unlikely that the government would have agreed to the deal that it did—five years' imprisonment—if it had been apprised of the full extent of Murr's alleged offenses. As the court opined, the burden was on Murr to obtain the best plea bargain that he could. Not surprisingly, he decided to keep silent about his cocaine venture in Kentucky, running the risk that it would eventually be exposed by the government. Unhappily for him, he lost this gamble and was indicted there. As we detect nothing akin to fraud surrounding the construction of the Tennessee plea agreement, the district court was correct in not going beyond its four corners to find that it did not bar Murr's prosecution in the instant case.

B. Sufficiency of the Evidence

Murr next contends that there was insufficient evidence underlying his conviction for having engaged in a continuing criminal enterprise.

Five elements comprise a continuing criminal enterprise offense:

> (1) a felony violation of the federal narcotics law: (2) as part of "a continuing series of violations;" (3) "in concert with five or more persons;" (4) for whom the defendant is an organizer or supervisor; and (5) from which he derives substantial income.

United States v. *English*, 925 F.2d 154, 156 (6th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2810, 115 L.Ed.2d 983 (1991) (quoting 21 U.S.C. § 848(c) (1988)). Viewing the evidence in the light most favorable to the government, we are persuaded a rational trier of fact could have determined that Murr's conduct satisfied these elements beyond a reasonable doubt.

The evidence revealed that Murr distributed thousands of dollars worth of illicit narcotics in an ongoing venture. His challenge to his conviction under 21 U.S.C. § 848 primarily rests on his assertion that he did not manage or organize "five or more persons," with whom he acted "in concert." We believe, however, that the government proved that Murr supervised at least six other individuals in such a context: Jerry Parks, Jim Hurt, Diane Whited, Tommy McKeehan, Robert Phibbs, and Ernie Nicely.

Jerry Parks was brought to Knoxville through Murr's machinations in order to sell cocaine to his pre-existing customers. Parks did so from August of 1988 until May of 1989. He obtained the drug in Kentucky at Murr's direction and, from January of 1989 until May of 1989, stored it in Knoxville. Murr paid him $500 for each kilogram of cocaine that he transported from Kentucky and $100 for each ounce of the drug that he delivered to Murr's customers.

Murr argues that Parks' employment with him could not have been used to support his continuing criminal enterprise

conviction because the government was aware that Parks was selling drugs for him in the Eastern District of Tennessee when it entered into its plea agreement with him there. As we have explained, however, this agreement did not shield Murr from prosecution in the Eastern District of Kentucky. In addition, it did not prevent the government from using evidence which it possessed at the time to prove a criminal offense of which it did not then have actual knowledge. *See United States* v. *Sutton*, 794 F.2d 1415, 1423 (9th Cir.1986).

After Parks was arrested in May of 1989 on a burglary charge, Murr brought in Jim Hurt to take over some of Parks' functions. *See Unived States* v. *Chalkias*, 971 F.2d 1206, 1214 (6th Cir.1992) (approving customers is indication of coordination of another). Hurt sold cocaine to Edward Rogers but, as this cocaine was not of acceptable quality, Rogers stopped buying from Hurt. Murr then began supplying Rogers himself.

Murr asserts that Hurt, who stepped into Parks' shoes, could not have been considered a distinct "person" for purposes of 21 U.S.C. § 848. However, as long as the defendant was an organizer or a supervisor of a "larger criminal organization," it is irrelevant that particular underlings came and went and were replaced. *United States* v. *Bafia*, 949 F.2d 1465, 1470-71 (7th Cir.1991). *See also United States* v. *Bond*, 847 F.2d 1233, 1237 (7th Cir.1988) ("A small time dope dealer who keeps to himself and has a single mule to smuggle the drug into the country is outside the statute's scope. The dealer's need to replace his aide . . . would not authorize a CCE prosecution on the theory that the small-timer had one servant in January, a second in February, a third in March, and so on. The organization would never be larger than two."). Here, there was evidence that Murr coordinated a drug distribution enterprise of some dimension. As a result, Hurt could have been counted as a separate "person" who was managed by him.[14]

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[14] Murr asserts that, as the goverment's theory that Hurt was a supervisee of his was never advanced in front of the grand jury, there was a fatal

The cocaine that was procured by Murr from September through November of 1988 was stored in the house he rented for defendant Diane Whited. *See Chalkias*, 971 F.2d at 1214 (storage of drugs in domicile of another implies existence of managerial relationship). Murr placed the drugs under Whited's dominion during that time and, on at least one occasion, she helped Murr and Parks weigh and package them. Parks made 15 to 20 trips to Whited's residence during the fall

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variance between the indictment and the evidence introduced at trial. As a result, Murr argues that he was denied his Fifth Amendment right to be tried only upon those offenses which were first presented to a grand jury. The Supreme Court had concluded that an indictment is sufficient "if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). It is "generally sufficient if it sets forth the words of the statute itself, as long as the statute itself adequately states all of the elements of the offense." *United States* v. *Paulino*, 935 F.2d 739, 750 (6th Cir.), *cert. denied*, __ U.S. __, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992). Here, the indictment emanating from the grand jury tracked the statutory language of 21 U.S.C. § 848, without naming any of the five persons purported to have been organized or managed by Murr. However, we have held in regard to a conspiracy charge that "it is the grand jury's statement of the 'existence of the conspiracy agreement rather than the identity of those who agree' which places the defendant on notice of the charge he must be prepared to meet." *United States* v. *Piccolo*, 723 F.2d 1234, 1239 (6th Cir.1983) (en banc) (quoting *United States* v. *Davis*, 679 F.2d 845, 851 (11th Cir.1982)). Similarly, with a continuing criminal enterprise offense, there is no requirement that the indictment set out the identities of five alleged supervisees; the govenrment need only demonstrate at trial that five or more persons were, in fact supervised. Murr also asserts that his Fifth Amendment rights were violated when the government did not pursue before the petit jury its theory, which it had put to the grand jury, that L.D. Welch and Conrad Schultz were part of his criminal enterprise. To Murr, this constituted an improper modification of the indictment. However, it is well-established that a "variance between the broad allegations in the indictment and the narrower proof at trial" is acceptable so long as "the offense proved was fully contained within the indictment." *United States* v. *Miller*, 471 U.S. 130, 137, 105 S.Ct. 1811, 1816, 85 L.Ed.2d 99 (1985). Such was the situation here.

of 1988 to pick up cocaine which he then sold to Murr's customers. She, in turn, "watched" some of money that was generated from these transactions. She was plainly a supervisee of Murr's.

While defendant Tommy McKeehan had his own customers to whom he sold drugs, he was also supervised in many respects by Murr. Each of McKeehan's excursions to Kentucky to buy cocaine, except for one, was arranged by Murr. During the initial trips, McKeehan travelled with Murr and was dependent upon him to get the drugs from defendant Kenneth Lawson and then to give McKeehan his share. Eventually, Murr assigned Parks to accompany McKeehan to Kentucky in his stead. Only the May 1989 trip was put together by McKeehan, after Murr told him it would be all right to bypass Lawson and to contact defendant Victor Rojas directly. "The ordinary meaning of the word 'organizer' does not carry with it the implication that the organizer is necessarily able to control those whom he or she organizes." *United States* v. *Ray*, 731 F.2d 1361, 1367 (9th Cir.1984). Although McKeehan had a significant degree of free agency vis-a-vis Murr, Murr facilitated his cocaine purchases; in turn, McKeehan lent support to Murr's efforts and submitted to his authority. Hence, Murr "organized" him in a manner coming within the ambit of 21 U.S.C. § 848.

On Murr's instructions, Robert Phibbs helped get Parks' probation transferred to Knoxville so that he might work for Murr in the drug distribution ring. When Parks sold cocaine to Murr's customers, he often gave the money he received in return to Phibbs for safekeeping. Phibbs was also part of the "security system" for concealing the cocaine stash after it was moved from Whited's residence. In case anything happended to Parks, he was the only other person who knew exactly where the drugs were located. After Murr was arrested in August of 1989, Phibbs collected money owed to Murr by defendant Edward Rogers from cocaine purchases made by Rogers. All of these activities suggested that Phibbs was an integral part of Murr's enterprise from September of 1988 through August of 1989.

In 1987, Ernie Nicely entered into a partnership with Murr in several ventures. Until their assets were sold in June of 1989, Murr furnished Nicely with some of the proceeds from his drug sales to keep these businesses afloat. However, Murr required Nicely "to cover for half the money," i.e., to take credit for half of the investments, even though all of the money was actually coming from Murr. Nicely understood this money to be drug-related. After the assets of the businesses were liquidated, the proceeds were delivered by Nicely to Phibbs at Murr's direction. As a result, the jury could have concluded that Murr used Nicely to knowingly launder some of the profits from the drug distribution ring. While Nicely may have been unaware of most of the details of Murr's cocaine operation, he clearly knew that Murr was trafficking in cocaine, and that his assistance was being sought in an attempt to squirrel away drug profits. He therefore agreed to the "design or plan" of Murr's venture. *United States* v. *Schuster*, 769 F.2d 337, 340 (6th Cir.1985) (citing *Jeffers* v. *United States*, 432 U.S. 137, 148-49, 97 S.Ct. 2207, 2214-15, 53 L.Ed.2d 168 (1977)).

Accordingly, Murr supervised or otherwise coordinated at least five persons within the framework of a continuing criminal enterprise.[15] Nonetheless, Murr argues that, pursuant to 21 U.S.C. § 848, the government was obligated to prove he acted "in concert" with five other individuals simultaneously; evidence that five or more persons were involved in the enterprise at various times is not enough. He goes on to contend that the participation of the members of the drug distribution ring did not overlap such that he could have been shown to have managed the same five individuals in a series of drug offenses.

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[15] The government has also asserted that Murr's ex-wife, Judy Murr, was controlled by him. In ruling upon Murr's motion for judgment of acquittal, the district court found that there was "no direct evidence that she was consciously a part of the drug conspiracy or did anything in furtherance of the conspiracy." After reviewing the record, we concur in the court's holding.

Every circuit which has considered this argument has rejected it. *See Bafia*, 949 F.2d at 1470; *United States* v. *Jenkins*, 904 F.2d 549, 553-54 (10th Cir. 1990); *United States* v. *Ricks*, 882 F.2d 885, 891 (4th Cir. 1989), *cert. denied*, 493 U.S. 1047, 110 S.Ct. 846, 107 L.Ed.2d 841 (1990); *United States* v. *Fernandez*, 822 F.2d 282, 386 (3rd Cir.), *cert. denied*, 484 U.S. 963, 108 S.Ct. 450, 98 L.Ed.2d 391 (1987); *United States* v. *Boldin*, 818 F.2d 771, 775-76 (11th Cir.1987); *United States* v. *Lueth*, 807 F.2d 719, 731 (8th Cir.1986); *United States* v. *Burt*, 765 F.2d 1364, 1366 (9th Cir.1985); *United States* v. *Young*, 745 F.2d 733, 747 (2d Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985); *United States* v. *Phillips*, 664 F.2d 971, 1034 (5th Cir.1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). "The question is whether [the defendant] acted in concert with five *as manager or coordinator*. It is on this question that the tenure of office of the staff is irrelevant." *Bond*, 847 F.2d at 1237 (emphasis added).

Hence, the government was only required to demonstrate that Murr had a conspiratorial agreement, as part of a design or plan, with each of at least five underlings. The five need not have acted in concert with each other. *Bafia*, 949 F.2d at 1471 (citing *Jeffers* v. *United States*, 432 U.S. 137, 147-49 and n. 14, 97 S.Ct. 2207, 2214-15 and n. 14, 53 L.Ed.2d 168 (1977)). We are convinced that the government met its burden in this regard.

Murr further claims that the evidence underlying both his conviction for conspiracy and his distribution convictions was also insufficient. However, Parks' testimony was that he, Murr, and McKeehan made three trips to Kentucky in the fall of 1988 to obtain multi-kilogram quantities of cocaine from Lawson and Rojas. These drugs were then resold by them in Knoxville. In 1989, McKeehan and Parks journeyed to Kentucky on a monthly basis to procure cocaine. With one exception, Murr invested in the acquisition of these drugs, arranged the transactions, and directed the distribution of the drugs in Knoxville. McKeehan essentially gave the same account of Murr's actions at trial. Furthermore, Edward Rogers testified

that he was introduced to Parks by Murr, who asked him whether he would be willing to purchase cocaine from Parks. After Parks was arrested, Murr replaced him with Jim Hurt, and when Rogers became dissatisfied with the cocaine sold to him by Hurt, Murr personally supplied Rogers. This testimony, and that of other witnesses, was corroborated by the government's introduction of hotel and telephone records, as well as books taken from Parks, which detailed some of the activities of the drug distribution ring. Such evidence could have led a rational jury to find Murr guilty of those charges on which he was convicted.[16]

C. Bill of Particulars; Jury Instructions

Murr further contends that the district court erred in denying his motion for a bill of particulars naming the five in-

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[16] Murr especially takes issue with his convictions on count two (possession of cocaine with intent to distribute, or aiding and abetting the same, on or about August 25, 1988) and count nine (possession of cocaine with intent to distribute, or aiding and abetting the same, on or about May 8 or 9, 1989) of the indictment. With regard to count two, there was evidence that Murr planned to obtain four kilograms of cocaine from Lawson near Lexington, Kentucky, on the date charged. However, the transaction did not come off because Parks, who was carrying the money, was delayed in reaching the Kentucky rendezvous site. The deal was ultimately consummated after other arrangements were made. It was reasonable to infer that when Murr met with Lawson on August 25, one or both of them possessed the cocaine, though the exchange did not actually take place on that date. Even if the cocaine was exclusively in Lawson's possession, liability could be imputed to Murr as a co-conspirator under *Pinkerton* v. *United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). As for count nine, the evidence showed that Parks and McKeehan travelled to Kentucky to acquire one kilogram of cocaine, which was brought by McKeehan with his own money. However, Murr set up the purchase and sent Parks, his subordinate, to accompany McKeehan on the trip. Furthermore, after Parks and McKeehan returned to Knoxville, Tennessee, about half of the kilogram of cocaine was conveyed to Parks on Murr's behalf because their supply of the drug had run out. This was supported by Parks' seized drug records, which showed that he had "borrowed" approximately 16 ounces of cocaine from McKeehan in May of 1989. Thus, there was sufficient evidence to sustain Murr's conviction on count nine.

dividuals whom he purportedly supervised in a continuing criminal enterprise. He asserts that, in the absence of such information, he was deprived of his ability to prepare a proper defense.

"The grant or denial of a motion for a bill of particulars lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion." *United States* v. *Rey*, 923 F.2d 1217, 1222 (6th Cir. 1991). "Proof of abuse of discretion 'requires a showing of actual surprise at trial and prejudice to the defendant's substantial rights by the denial.' " *Id.* (quoting *United States* v. *Paiva*, 892 F.2d 148, 154 (1st Cir. 1989)).

Absent such a showing, "there is no requirement that an indictment or a bill of particulars identify the supervisees in a [case pursuant to 21 U.S.C. § 848]." *English*, 925 F.2d at 159 (quoting *United States* v. *Zanzucchi*, 892 F.2d 56, 58 (9th Cir.1989)). The statute "does not make the identity of the [persons managed] important"; the government only has to prove that five or more individuals were, in fact, managed by the defendant. *United States* v. *Beverly*, 913 F.2d 337, 352-53 (7th Cir.1990).

Our task, therefore, is to determine whether Murr was legitimately surprised at the list of alleged supervisees first referred to by the government following the close of its proof. We think that he was not. Tommy McKeehan, Diane Whited, and Robert Phibbs, were co-defendants and were further referred to in pretrial discovery. Jerry Parks and Ernie Nicely, were known by Murr to be government witnesses, and were cross-examined by him at a hearing one month prior to trial. Jim Hurt's name was included in the government's supplemental bill of particulars, filed on September 11, 1991. Murr's ex-wife, Judy, lived with him at times during the life of the conspiracy, and was adverted to in Special Agent Merryman's grand jury testimony, which was provided to Murr as Jencks Act material. *See* 18 U.S.C. § 3500. As a Result, Murr should have been put on notice that any or all of these individuals might be persons whom the government would allege were controlled by him.

Murr also claims that the district court erred in refusing to instruct the jury, as requested by the defense, as to which persons could not be considered one of the five predicate supervisees for a conviction under 21 U.S.C. § 848.

When it became apparent that Murr's suggested list was unduly long, the court raised the possibility of furnishing the jury with the names of the seven individuals whom the government actually contended were managed by him. Murr's counsel, however, objected to Judy Murr's name being included in this fashion because "we never had the opportunity to even deal with her." The court, feeling it was being "whipsawed," then offered defendants a choice: it would either tell the jury to only consider the seven persons specified by the government, or it would give no other instructions on the matter. When Murr's counsel continued to protest, the court decided not to provide a narrowing instruction.

We have not adopted a pattern instruction for the offense of conducting a continuing crimninal enterprise. *Chalkias*, 971 F.2d at 1215 n. 10. The district court stepped into this void by informing the jury, in part, that

> [t]he terms organizer, supervisor, or manager are to be given their usual and ordinary meanings as commonly understood by the public or business community. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activity in one operation or enterprise. A supervisory position can be defined as meaning one who manages or directs or oversees the activities of others. In other words, the Government must prove beyond a reasonable doubt that the Defendant Murr was more than just a fellow worker, but likewise Defendant Murr need not be the dominant organizer or manager as long as he was in a managerial position with respect to five other persons.

In *United States* v. *Chalkias*, we held that a less-detailed instruction than this one was not "so deficient as to constitute plain error." *Id.* at 1215. There, we were invited to adhere to a ruling by the Ninth Circuit that

> where the jury had a confusing array of persons presented, some of whom could be counted [as persons managed by a CCE defendant] and some of whom could not be counted, it was plain error to fail to instruct the jury as to who could not count towards[the defendant's] conviction of a continuing criminal enterprise.

Id. at 1214 (quoting *United States* v. *Jerome*, 924 F.2d 170, 173 (9th Cir.), *opinion replaced*, 942 F.2d 1328 (9th Cir.1991)).

Jerome involved a situation where the government had argued to the jury that the defendant could be viewed as the organizer of his "suppliers" and "the suppliers of his suppliers." 924 F.2d at 172. The Ninth Circuit was of the opinion that this was incorrect as a matter of law, holding that "an organizer within the sense of the statute [is more than] simply being a steady customer." *Id.* at 173. Accordingly, the district court's lack of an instruction in this regard was troublesome.

The circumstances were different in *Chalkias*; the government did not put before the jury "an erroneous list of persons managed by [the defendant]." 971 F.2d at 1215. Consequently, we determined that the holding in *Jerome* was not applicable. We also declined to take the position that "failure to give an instruction setting out the persons that could not be considered to have been managed by a CCE defendant is *per se* plain error." *Id.*

In the case at bar, as in *Chalkias*, the government did not mislead the jury concerning who, as a matter of law, could be deemed to be a supervisee of Murr's.[17] This leads us to reach

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[17] In passing upon Murr's motion for judgment of acquittal, the district court found there was insufficient evidence that Judy Murr was managed by Murr. The jury, however, was not categorically misinformed about her conduct as was the jury in *Jerome*. In that case, the Ninth Circuit held that persons who have the *status* of suppliers cannot be said to have been "organized" by their customers. Nothing that Judy Murr supposedly did to advance the charged conspiracy put her in a similar position.

the same conclusion as we did there—that the jury was not subjected to undue confusion "in the context of the case as a whole." *Id.*

Murr further suggests that the district court should have instructed the jury that, in order to convict him of directing a continuing criminal enterprise, it had to unanimously determine the identities of the five individuals he supervised or organized. As the jury was under no duty to make such a finding, Murr's argument lacks merit. *Id.* at 1214 n. 7. *See also English*, 925 F.2d at 157-58.

Additionally, Murr asserts that the district court should have instructed the jury that a mere buyer-seller relationship does not establish one that is supervisory in nature. *See Chalkias*, 971 F.2d at 1214. However, the evidence adduced at trial indicated that none of the individuals the government contended he managed was in a buyer-seller relationship with him. Therefore, he was not entitled to the requested instruction. *See United States* v. *Canino*, 949 F.2d 928, 941 (7th Cir.1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1701, 118 L.Ed.2d 410 (1992).

D. The Government's Disclosure of *Brady* and Jencks Act Materials

Lastly, Murr asserts that the government did not turn over relevant exculpatory and impeachment evidence to defendants in a timely manner, thereby denying them a fair trial.

Pursuant to the Jencks Act, 18 U.S.C § 3500(b), "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

Furthermore, as a general matter, the government is required "upon request, to give a defendant any exculpatory information the prosecut[ion] may have which is material to guilt or innocence." *United States* v. *Bibby*, 752 F.2d 1116, 1125 (6th Cir.1985) (citing *Brady* v. *Maryland*, 373 U.S. 83,

83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). Similarly, the accused must be afforded any relevant impeachment evidence. *See United States* v. *Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Unlike the Jencks Act, the force of *Brady* and its progeny is not limited to the statements and reports of witnesses.

Murr calls our attention to the following *Brady* and Jencks Act materials which the defense either did not receive or, in his opinion, did not receive in time to have used effectively at trial: documents reporting suspected wrongdoing by Tommy McKeehan; notes from government-conducted interviews of McKeehan; probation officer Ed Lynn's file on Jerry Parks; forms outlining government payments to Parks and Ernie Nicely; information about Parks' association with an individual named Sam Scruggs in a cocaine distribution scheme; checks made out to Parks by Murr and drawn on Automotive Enterprises; the original of a letter by Robert Phibbs to the United States Probation Office offering Parks a job with Automotive Enterprises; Parks' tape recordings recounting his participation in a variety of drug transactions; Jencks Act material derived from Edward Rogers; and Parks' prison records. Murr contends that, had defendants been able to take advantage of these materials, they might have influenced the jury's assessment of their culpability.

The record reveals that defendants were, in fact, able to make use of Parks' tapes at trial, playing portions of them to the jury. Likewise, the defense employed Lynn's file on Parks to conduct a searching cross-examination of the officer.

As for Parks' prison records, the government maintains that they were never in the prosecution's control and that it was otherwise unaware of any exculpatory information contained within them. *See Bibby*, 752 F.2d at 1125 (due process requires only that government, upon request, divulge to defendant relevant exculpatory evidence possessed by the prosecution); *United States* v. *Agurs*, 427 U.S 97, 110, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342 (1976) (*Brady* doctrine only covers evidence which prosecution knew or should have known was exculpatory). The government did evenutally provide the

records to defense counsel just before Parks was cross-examined, and they were exploited accordingly.

The government furnished the defense with records concerning payments made to Parks and Nicely stemming from their respective service as informants. Other memoranda were given to the district court under seal because they included information regarding their whereabouts following their relocation by the government. The court reviewed these documents in camera and determined they had no impeachment value beyond those materials which defendants already had obtained. Our own examination of the memoranda confirms this. Their suppression did not act to "undermine confidence in the outcome" of the instant case. *Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381.

With regard to the Phibbs letter and the checks made out to Parks by Murr, government counsel stated to the district court that these materials only "came to [his] attention" after the discovery deadline had passed. He then promised to turn them over to defendants. When the government could not find the original Phibbs letter, it sought to introduce a copy into evidence; the district court sustained a defense objection to the copy being admitted. While there are conflicting accounts of whether the checks were, in fact, furnished to the defense, Murr was able to introduce into evidence an Automotive Enterprises check written out to Parks by Phibbs, and had the opportunity to cross-examine Parks about the check. Assuming, *arguendo*, that defendants did not receive the checks, the totality of the evidence presented convinces us there was not a reasonable probability that, had they been disclosed, the results of the trial would have been different. *See Pennsylvania* v. *Ritchie*, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987).

Government counsel and Special Agent Merryman interviewed McKeehan before trial regarding his drug dealing. McKeehan did not, however, adopt the notes that were taken at these interviews as "substantially verbatim to the statement[s] given [by him]." *United States* v. *Williams*, 962 F.2d 1218, 1224 (6th Cir.), *cert. denied*, *Williams* v. *United States*,

__ U.S. __, 113 S.Ct. 264, 121 L.Ed.2d 194 (1992) (quoting *United States* v. *Arnold*, 890 F.2d 825, 829 (6th Cir.1989)). As a result, they did not constitute Jencks Act material.

The defense also requested information concerning McKeehan's plea agreement with the government, and any investigations of criminal wrongdoing on his part touched upon by the agreement. In response, defendants were provided with copies of the agreement, which named 16 judicial districts where the government had afforded McKeehan protection from prosecution. In addition, they were given copies of both McKeehan's "rap sheet" and an affidavit from his treating psychiatrist.

The government went to on to describe to defendants two incidents of cocaine transportation which explained the inclusion of most of the 16 districts in McKeehan's plea agreement. Defendants, however, asked for additional information which would account for the remaining districts; in particular, they sought the results of a Tennessee grand jury investigation into McKeehan's activities. Government counsel asserted that it was not required to divulge evidence concerning "suspected" wrongdoings on ongoing criminal investigations. He then represented to the district court that the government had disclosed all "tangible" records of established wrongdoing, i.e., McKeehan's criminal history and misconduct acknowledged by him as part of his plea bargain.

Evidence in the prosecution's files related to the "suspected" wrongdoing of a witness must be made known to the defendant if it is favorable to the accused and is material to the question of his guilt or innocence. *See Bagley*, 473 U.S. at 676, 105 S.Ct. at 3380. The Supreme Court, in construing the government's obligations under *Brady v. Maryland* and its offspring, has drawn no distinction between such evidence and that pertaining to proven or admitted criminal behavior.

Frequently, though, evidence associated with "suspected" wrongdoing will not be admissible even for impeachment purposes, having no bearing on the capacity for truth of any witness. Furthermore, even if logically relevant, its prejudicial effect may nonetheless substantially outweigh its pro-

bative value, thus pointing towards its exclusion. *See* Fed.R.Evid. 403. Additionally, its probative value may be eclipsed by the likely harm resulting from its public revelation, such as to persons embroiled in the case, or to others, or to the success or direction of a continuing official investigation. However, in the unusual instance that its suppression acted to deny a defendant a fair trial, reversal is mandated. *See Bagley*, 473 U.S. at 678, 105 S.Ct. at 3381.

Here, we are satisfied that defendants were accorded the lion's share of any evidence the government had that properly could have been used to impeach McKeehan. The defense incisively cross-examined him on the basis of this evidence. We do not feel the outcome of the proceedings would have been altered if defendants had been privy to the information which was withheld from them.

In the case of Rogers, defendants were furnished with copies of his plea agreement, which memorialized his guilty plea to the conspiracy charged in the case at bar, as well as to a RICO charge flowing from a pending investigation in the Eastern District of Tennessee. They were also given copies of Rogers' "rap sheet," information regarding sundry other "bad acts" committed by him, and copies of five reports of government interviews with him.

The government did not, however, provide the defense with transcripts of FBI interviews with Rogers concerning his awareness of facts pertinent to the Tennessee RICO investigation. These documents were filed under seal with the district court, which found that they did not contain exculpatory information. We concur with the court's decision not to compel the release of this material.

The information concerning Parks' transportation of cocaine for Sam Scruggs in the summer of 1988, just pirior to the time he joined the charged conspiracy, was also kept under seal by the district court. Much of it probably would not have been admissible as probative of Parks' character for truthfulness. *See* Fed.R.Evid. 608(b). At most, if disclosed to the defense, it would have constituted cumulative impeachment evidence. Accordingly, its suppression does not require

that defendants' convictions be vitiated. Having thus concluded that the district court's handling of defendants' *Brady* and Jencks Act concerns was appropriate, Murr's contention must be rejected.

AFFIRMED.

APPENDIX B

Nos. 92-5522/5730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

ROBERT DALE MURR,
Defendant-Appellant.

ORDER

(Filed October 04, 1993)

BEFORE: GUY and SHUHRHEINRICH, Circuit Judges; DOWD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN, Clerk

* Hon. David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Lexington Criminal No. 90-26-S
September 6 and 9, 1991
10:10 a.m. and 9:40 a.m.

UNITED STATES OF AMERICA,

-vs-

VICTOR MANUEL ROJAS, WILLIAM BAIRD, BILLIE DYE, REBA ENGLAND, RAYMOND EUGENE HUCKELBY, DAVID HURT, KENNETH RAY LAWSON, MARY LAWSON, TOMMY McKEEHAN, ROBERT DALE MURR, WILLIAM ROBERT PHIBBS, DIANE WHITED,
Defendants.

TRANSCRIPT OF HEARING ON PENDING MOTIONS BEFORE THE HONORABLE HENRY R. WILHOIT, JR. UNITED STATES DISTRICT JUDGE

Court Reporter: Peggy Westman, RPR
Official Court Reporter
P.O. Box 362
Lexington, Kentucky 40585-0362
606/254-5564

Proceedings recorded by mechanical stenography and computer.

EXCERPT OF PROCEEDINGS

[309] THE COURT: All right. Now, in regard to the motion to dismiss filed by the Defendant Mr. Murr, the

Court, of course, heard the testimony and the allegation was made that they took the plea down in Knoxville, and the agreement was that this defendant was just — had bought his peace with 24,000 plus at — and the plea to these charges and the incarcerated sentence that he received, that he was buying his peace. At the hearing, the Court heard the witnesses testify and is convinced that the authorities here in Lexington did not know contemporaneously at the time that all this was going on in Tennessee of this prosecution in Tennessee and that the prosecutors in Knoxville did not have knowledge of the Rojas case and the other investigations going on up here. Of course, they didn't. They had no knowlege of that. The Court might take a cynical view that they did. But there's just — simply not enough testimony in there to justify the Court to impute this kind of knowledge [310] to the prosecutors.

If I read the plea agreement literally and analyze it, it does not take — it is not very difficult to see that he was — the defendant was buying his peace in the Eastern District of Tennessee and other specified districts that were brought up during the plea negotiations. And had the Eastern District of Kentucky been mentioned and had the United States agreed to waive prosecution of the Eastern District of Kentucky, then no question but what this indictment must be dismissed. But that was not the case.

The defendant honestly believes that he was sandbagged. As I have indicated, I cannot make that finding. On the other hand, if the defendant was sandbagged, perhaps the United States was sandbagged. Because if it is true that Mr. Moncier had — Mr. Murr had business dealings with Kentuckians in regard to illegal drug trafficking, then — then he could have easily asked the prosecutor to include the Eastern District of Kentucky. And maybe if he was trying to buy his peace, he should have brought it up.

I am aware, as Mr. Moncier argued at the hearing, that his client was on the horns of a dilemma, that had he mentioned the Eastern District of Kentucky or some district in North Carolina, or wherever, that that may have — that may have chilled the United States into accepting the plea agreement at

all. And, of course, this was the risk that he [311] ran. When he didn't mention the Eastern District of Kentucky, he ran the risk of any illegal activities coming to light, if there were any. Of course, if he has not done business in the Eastern District, drug business in the Eastern District of Kentucky, and there is no evidence of it, he will be acquitted. So there will be no problem anyway. But the plea agreement described the district with specificity and there was nothing that came out in the hearing where I would impute improper motives on the part of the United States.

So the motion to dismiss is overuled, as well as the motion to transfer to the Eastern District of Tennessee, because according to representations made to the Court by the United States this — even while there were acts that were done in Tennessee, still, this is a Kentucky conspiracy and the transactions that are mentioned in the complaint are alleged to have taken place in the Eastern District of Kentucky.

If the proof fails to establish that these transactions took place in the Eastern District of Kentucky, then there is no problem. Each one or all of those counts will be dismissed at the appropriate time. So the motion to transfer to the Eastern District of Tennessee is overruled.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL ACTION NO. 90-26-S

UNITED STATES OF AMERICA,
PLAINTIFF,

VS.

ROBERT DALE MURR,
DEFENDANT.

ORDER

(Filed August 12, 1991)

This matter is before the Court upon the motion of the defendant, Robert Dale Murr, for a bill of particulars. At a hearing held on all pending motions on August 1, 1991, the Court withheld ruling on the part of this motion concerning Count 13 of the indictment. The United States has filed a response in opposition to the motion.

Count 13 of the indictment in the above styled criminal action alleges that between May 1, 1988, and the date of the indictment the defendant;

> engaged in a continuing criminal enterprise in that he did commit a violation of Title 21, United States Code, Section 842(a)(1), to wit, possession of cocaine, a Schedule II controlled substance as listed in Title 21, United States Code, Section 812, with violation was a part of a continuing series of at least three violations of Title 21, United States Code, Section 841(a)(1), **including but not limited to** the violations set forth in Counts 2 through 12 of this indictment . . . .

The defendant has cited to the Court the decision in *United States of America* v. *Paulino, et al.*, __ F.2d __ (6th Cir., decided June 3, 1991), in which the Court of Appeals upheld an indictment by which the defendant was also charged with engaging in a continuing criminal enterprise (CCE). Although the CCE count did not list specific predicate acts, it specified the time frame in which the acts occurred, "which would satisfy any double jeopardy concerns." Slip op. at 15. As relevant to the instant motion, the court continued:

> Furthermore, . . . the availability of a **bill of particulars** provides adequate protection for a defendant's sixth amendment right by providing him with a means of discovering the **specific violations the government intends to use at trial.**

Id. (emphasis added).

This Court has already held that the violations set forth in Counts 2 through 12 have been sufficiently pleaded. However, other violations are contemplated by the language in Count 13, "including but not limited to." If the government intends to rely upon proof of other violations, not specified in the indictment, in order to establish the predicate acts of the CCE, it must provide the following information with specificity to the defendant.

The defendant is entitled to the date, time, location and such other information of additional violations as if set forth in separate counts of the indictment. If this information is not provided to the defendant, testimony as to other violations will not be permitted in the United States' case-in-chief. The Court would then want to hear further arguments of the parties about striking the language of the indictment which could create undue prejudice to the defendant.

The defendant is not entitled to the names of alleged co-conspirators and persons alleged to have been supervised by the defendant, as such disclosure pre-trial is not permitted by the Jencks Act, 18 U.S.C. § 3500. The Court being sufficiently advised;

Accordingly,

IT IS THEREFORE ORDERED:

(1) that the motion of the defendant, Robert Dale Murr, for a bill of particulars concerning unidentified predicate acts of the continuing criminal enterprise alleged in Count 13 be, and hereby is **SUSTAINED;**

(2) that the United States shall provide the bill of particulars, as described herein, on or before August 23, 1991.

This 9 day of August, 1991.

/s/ HENRY R. WILHOIT, JR., JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL NO. 90-26-S

UNITED STATES OF AMERICA
PLAINTIFF

V

VICTOR MANUEL ROJAS, ET AL
DEFENDANTS

ORDER
(Filed September 12, 1991)

On September 9, 1991 came the plaintiff by counsel, Assistant United States Attorneys, Francis Catron and Michael Winck; the defendant, Victor Manuel Rojas, was present and represented by counsel, Fred Peters; the defendant, William Baird, was present and represented by counsel, Daniel Dotson; the defendant, Raymond Eugene Huckelby, was present and represented by counsel, Derek Gordon; the defendant, Kenneth Ray Lawson, was not present but was represented by counsel, Kenneth Smith; the defendant, Mary Lawson, was present and represented by counsel, Benjamin Hicks; the defendant, Tommy McKeehan, was present and represented by counsel, Ralph Harwell and Janice Kell; the defendant, Robert Dale Murr, was present and represented by counsel, Herb Moncier and Ann Short; the defendant, William Robert Phibbs, was present and represented by counsel, Andrew Stephens; the defendant, Diane Whited, was present and represented by counsel, Julius Rather. The case was called for a continuation of the September 6, 1991 hearing on pending

motions and was recorded by Peggy Westman, Official Court Reporter.

The Court having heard counsel and being advised,

IT IS NOW THEREFORE ORDERED,

1. That the oral motion of the United States for a bench warrant, returnable forthwith, to issue for the defendant, Kenneth Lawson, for failure to appear on September 9, 1991 is sustained; and counsel for the United States shall cause process to issue.

2. That the all motions of the defendants to strike evidence because of failure of the prosecution to comply with Rule 16 of the Federal Rules of Criminal Procedure be and they are overruled.

3. That the motion of the defendant, Robert Dale Murr, and joined by the defendants, Tommy McKeehan, William Baird, Victor Rojas, Diane Whited, to continue the trial of September 10, 1991 be and it is granted; and the case be and it is reassigned for jury trial on Friday, September 13, 1991 at 9:00 A.M. at Frankfort, Kentucky.

4. That the oral motion of the defendant, Robert Dale Murr, and joined by various other defendants, to continue the trial past September 13, 1991 be and it is overruled.

5. That the motion of the defendant, Robert Dale Murr, to compel a responsive bill of particulars be and it is overruled, except as otherwise ordered as reflected in the transcript of this hearing.

6. That the motion of the United States to unseal the hearing held under seal be and it is overruled at this time. Counsel for the defendant shall submit a proposed protective order as to the unsealing of certain portions of said hearing.

7. That the request of the defendant, Tommy McKeehan, for jury instructions and additional time to submit further instructions be and it is sustained.

8. That any special jury instructions requested by the parties shall be submitted to the Court by the end of the first week of trial.

9. That the motion of the defendant, Tommy McKeehan,

and orally joined by the defendant, Rober Dale Murr, to dismiss the indictment be and it is overruled.

10. That the motion of the defendant, Robert Dale Murr, to suppress all evidence provided by the prosecution in discovery pursuant to Rule 16 for which the prosecution may offer in evidence which may have been obtained in violation of the defendant's constitutional statutory or procedural rights be and it is overruled.

11. That the motion of the defendant, Robert Dale Murr, to suppress the tape recordings and transcript of May 20, 1990 be and it is subject to the Court's previous ruling, on September 6, 1991.

12. That the motion of the defendant, Robert Dale Murr, to dismiss the indictment for breach of plea agreement not to prosecute be and it is overruled.

13. That the oral motion of the defendant, Robert Dale Murr, to supplement the defendant's motion to dismiss the indictment for breach of plea agreement not to prosecute by filing, under seal, the documents previously provided to the Court by counsel for the United States for the Court's in-camera use, be and it is sustained and said documents shall remain under seal pending further orders of the Court.

14. That the motion of the defendant, Robert Dale Murr, to transfer proceedings to the Northern Division of the Eastern District of Tennessee be and it is overruled.

15. That the motion of the defendant, Tommy McKeehan, to suppress evidence seized in the second search of his home be and it is overruled.

This the 12 day of September, 1991.

/s/ HENRY R. WILHOIT, JR., JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL ACTION NO. 90-26-S

UNITED STATES OF AMERICA,
PLAINTIFF,

VS.

ROBERT DALE MURR, et al.,
DEFENDANTS.

MEMORANDUM OPINION AND ORDER
(Filed May 22, 1992)

This matter is before the Court upon post-trial motions of the defendant Robert Dale Murr, as follows: (1) renewed motion to dismiss for breach of plea agreement; (2) motion to dismiss or for new trial for prosecutorial misconduct; (3) motion for new trial based upon newly discovered evidence; (4) amended motion for new trial; and (5) motion for judgment of acquittal. The United States filed responses to all motions. Other defendants in this matter joined all or part of some of the motions as indicated below.

INTRODUCTION

On March 31, 1992, this matter was called on for hearing on pending post-trial motions of the defendant Robert Dale Murr. During the course of the three-day hearing, the Court heard the testimony of eleven witnesses called by the defendant and four witnesses called by the United States, as well as the arguments of the parties. The undersigned had presided

over a nearly four-week trial of eight of the thirteen defendants charged with a cocaine distribution conspiracy and related substantive offenses, as alleded in the indictment. Having considered all papers filed in the record with respect to the motions, all testimony and exhibits offered at the hearing, all arguments of counsel, and being well and thoroughly advised, the Court overruled all of the motions of defendant Murr, except upon one issue raised in his motion for judgment of acquittal. This memorandum opinion serves to supplement the findings and conclusions of the Court, as reflected in the transcript of the hearing held March 31, 1992 through April 2, 1991.

I. RENEWED MOTION TO DISMISS FOR BREACH OF PLEA AGREEMENT

This motion is a renewal of defendant Murr's pre-trial motion to dismiss for breach of plea agreement not to prosecute, upon which the defendant filed three memorandum and additional exhibits in support (DE #193, #304, 335). After several hearings (8/9/91, 9/9/91), the Court overruled the original motion and the case proceeded to trial.

By way of background to the renewed motion, the record shows that on January 11, 1990, defendant Murr entered into a Plea Agreement with the United States on an indictment returned in the United States District Court for the Eastern District of Tennessee, Criminal Number 3-89-62. Defendant agreed to plead guilty to two counts of unlawful distribution of cocaine. There was no conspiracy count in the indictment. The section of the agreement at issue is as follows:

> 5. If the defendant complies with the terms of this agreement, **the United States will not further charge the defendant in the Eastern District of Tennessee for those non-tax-related offenses of which it presently has knowledge.** It is further agreed that the defendant will not be prosecuted in the Northern District of Georgia for any non-tax-related offenses concerning actions involving Bobby Joe Wilson.

On January 16, 1990, defendant entered his plea before the Honorable Judge James H. Jarvis in the Eastern District of Tennessee, Northern Division, at Knoxville, Tennessee. On June 12, 1990, defendant was sentenced to a period of incarceration of 63 months as to counts one and two, to run concurrently, a term of three years supervised release as to count one and five years as to count two, to run concurrently, fined $70,000 and assessed $100.

Critical to the defendant's argument is the debriefing of unindicted co-conspirator Jerry Parks, on February 23-25, 1990, a little over one month after the plea agreement was signed and the plea entered. The evidence established that Parks gave substantial and previously unknown information about the cocaine distribution organization, defendant Murr's activities, and the Kentucky connection including the Rojas supply link, in exchange for a plea agreement with the United States. As a result of Parks' statements, defendant Murr became a target of the investigation in Kentucky.

The thrust of the defendant's argument, based upon evidence previously presented and evidence presented at or obtained in preparation for trial, is that agents of the United States had information at the time of the entry of the Plea Agreement which could or should have led them to believe that defendant Murr was involved in the distribution of cocaine through a Kentucky supply pipeline. Defendant argued that the government had within its control information from which the United States Attorney could conclude that defendant Murr was associated with defendants Lawson and Rojas, who were already under investigation. Thus, according to the defendant, Assistant United States Attorney Michael Winck (AUSA Winck), with whom the defendant negotiated his plea, should be charged with constructive knowledge of the offenses charged in the indictment in this case. Alternatively, the defendant claimed he was discouraged from seeking to include in the agreement the Eastern District of Kentucky as a prosecution-free zone, because AUSA Winck advised him with regard to including the Northern District of Florida, to "let sleeping dogs lie." In sum and in the vernacular, defendant Murr claimed he was sandbagged. For this reason, he

contended the United States breached its agreement and failed to fulfill its promise not to prosecute under the agreement. See *Santobello* v. *New York*, 404 U.S. 257 (1971); *United States* v. *Robison*, 924 F.2d 612 (6th Cir. 1991).

The defendant outlined the basis of his argument as falling into distinct periods or aspects; pre-plea agreement; post-plea agreement after Parks' debriefing; and collusive avoidance of the plea agreement.

In phase one, defendant pointed to FBI agent Merryman's knowledge of Murr's extensive cocaine distribution activities in Tennessee, from which he inferred Merryman must have known the cocaine was coming from somewhere other than Tennessee. He noted that he had been warned of the possibility of a continuing criminal enterprise charge. Defendant also referred to the "Freeman-Parks" tapes and the Morton affidavit, by which he concluded that agent Freeman had in his possession information that unindicted co-conspirator Parks was obtaining drugs from a source out of New York or New Jersey through Kentucky, but that no one bothered to look at these tapes. Although defendant conceded that AUSA Winck did not personally possess this information in January 1990, he asserts Winck failed to fully inform himself. Defendant argued in the alternative that he cannot be required to disclose every possible illegal act in every venue in order to "globalize" the Plea Agreement without being stripped of the protection of the Fifth Amendment.

With regard to phase two, defendant argued that when circumstances changed after the debriefing of Jerry Parks in February 1990, AUSA Winck should have informed the defendant that he had become the target of a new investigation. He contended that if the government had made this disclosure he would have had the option of renegotiating or going forward with the plea. Defendant also could have come to the United States Attorney for the Eastern District of Kentucky, where the Rojas prosecution was going forward, to try to make his peace in this district.

Defendant asserted that the plea in Tennessee was not final until it had not [sic] been accepted by the trial court. He characterized the plea as contingent upon the court's accep-

tance. Defendant noted that AUSA Winck did not disclose the information obtained in February 1990 to the presentence report officer or the court in Tennessee for purposes of consideration as relevant conduct. He claimed the United States wrongfully obtained complete financial disclosure during the presentence investigation, knowing that another prosecution was on the horizon.

Finally, defendant asserted that agents of the FBI and the U.S. Attorney's office in Knoxville colluded with agents in the Lexington FBI, DUE [sic] and U.S. Attorney's offices to bring the prosecution in the Eastern District of Kentucky to avoid the Tennessee Plea Agreement.

The Testimony

The Court heard the testimony of a number of witnesses called to testify with regard to the knowledge and actions of the involved assistant United States Attorneys and agents of the FBI, DEA and IRS. AUSA Winck testified that it was his position just prior to the return of the indictment in the Eastern District of Kentucky (E.D. Kentucky) that the United States could have prosecuted defendant Murr in the Eastern District of Tennessee (E.D. Tennessee) for any offenses *about which the United States had no knowledge when it entered the Plea Agreement.*

It is clear from Winck's testimony, as well as the testimony of AUSA's Frances Catron and Jane Graham and FBI Special Agent Clyde Merryman, that the United States Attorney's office in Kentucky was interested in going forward more quickly than the U.S. Attorney in Tennessee. A sealed indictment had been returned in Kentucky against defendant Rojas in May 1990, and as a result of his arrest in January 1991, Kentucky was ready to prosecute. As the scope of his conspiracy unfolded, the Kentucky and Tennessee offices of the United States Attorney agreed that conspiracy charges against defendant Murr and his co-conspirators should be brought in one indictment. AUSA Catron for the E.D. Kentucky, testified that while the conspiracy count could have been brought in either district, the substantive counts charged in the instant

indictment took place in Kentucky and had to charged in the Eastern District of Kentucky.

Conflict arose between the two United States Attorney's offices over the issue of timing because Parks was still providing valuable information in the E.D. Tennessee about this and other investigations. The U.S. Attorney for the E.D. Tennessee and the FBI in Tennessee wanted to milk Parks for all he knew before being forced to disclose the informant's identity. The return of a superseding indictment in Kentucky would effectively end Parks' undercover work. Agent Merryman, who was assigned to the investigation in Tennessee, testified that his office was also concerned about the speed with which the prosecution in Kentucky was going forward and the FBI's ability to abruptly switch gears from on-going investigation to trial preparation.

All of the witnesses' testimony established that the focus of a meeting held February 27, 1991 in Lexington was to determine when and where to go forward with the Rojas/Murr prosecution. To the extent that defendant Murr's plea agreement was discussed, all witnesses acknowledged that they understood the defendant would most likely contest the bringing of additional charges in Kentucky as being in violation of the plea agreement. AUSA Winck testified, however, that at no time did the plea agreement play a deciding factor in determining where to bring the charges. The assistant United States Attorneys agreed that under the express terms of the agreement, the conspiracy charge could be brought in either district because the basis for the charge was the new information about a previously unsuspected northern operation of the defendant Murr's drug organization. This information was provided by informant Jerry Parks on February 23-25, 1990, after defendant Murr entered into his plea agreement with the United States.

As to the threat of bringing a Continuing Criminal Enterprise count in the E.D. Tennessee, Winck testified that although he may have expressed the opinion in conjunction with the plea agreement that such a charge was a possibility, he lacked sufficient evidence at the time to support such a charge.

Analysis and Conclusion

Although the additional evidence presented at the hearing on post-trial motions was little more than a rehash of the evidence presented at pre-trial hearings in August 1991, it reinforced certain conclusions drawn by the Court in ruling upon the original motion. For the reasons stated in the record from the beginning when this issue was raised, and for the reasons that follow, the undersigned finds no basis in fact or law to dismiss this action as having been brought in violation of the Tennessee Plea Agreement. The Court concludes that by all objective evidence, AUSA Winck did not have knowledge of the Kentucky supply route on January 10, 1990 when he signed that plea agreement on behalf of the United States with defendant Murr. Pursuant to Winck's request, Agent Merryman searched his files in February 1991 to determine exactly what information the FBI had about Murr prior to the Parks disclosures in February 1990. He testified that there was nothing in the files that indicated any prior investigation of the defendant that would have yielded information prior to the January 1990 plea agreement about Murr's connection with the Kentucky supply route. The Court finds that the "Freeman-Parks" tapes may arguably have provided a clue, but they make no mention of Kentucky. Furthermore, before additional pieces of the underlying pattern of the conspiracy were revealed by Parks' disclosures, the tapes were insufficiently revealing to lead the United States to Murr's involvement in the Kentucky connection. There is no evidence of any serious consideration of a CCE charge in Tennessee.

Perhaps most telling to the Court is the fact that AUSA Winck agreed to a plea which would yield the defendant a five-year sentence of incarceration. If Winck had had any idea what was going on in Kentucky on January 10, 1990, he most likely would not have agreed to such a sweet deal. The Court concludes that the instant indictment was not the result of an attempt by the United States Attorney for the Eastern District of Tennessee to circumvent the agreement with defendant Murr.

The Plea Agreement was a contract between defendant Robert Dale Murr and the United States, clearly setting forth

the obligations of the parties. Although it contained an escape clause to allow the defendant to withdraw his plea if the court did not accept the agreement, the agreement was not conditional. The fact that AUSA Winck advised the defendant to "let sleeping dogs lie" with regard to a possible offense in the Northern District of Florida in 1987 or 1988, did not relieve the defendant of his burden to forge the best deal, the most global agreement within his ability and interest to do so. Defendant Murr chose not to include the Eastern District of Kentucky in the agreement. From the evidence heard in the trial of this case and upon which the jury returned a verdict of guilty on Counts 2-12, it appears the defendant had good reasons not to mention or suggest this district to the prosecutors in Knoxville.

The defendant was given the opportunity to negotiate for protection in other districts; having failed to include the Eastern District of Kentucky he cannot be heard to complain now. He ran the risk and lost. The Plea Agreement did not contain any promises concerning prosecutions in districts other than the Eastern District of Tennessee and the Northern District of Georgia. It did not purport to be global in nature and if it had it is unclear whether such an agreement would have been binding on other districts. *United States* v. *Robison*, 924 F.2d 612 (6th Cir. 1991).

As to whether AUSA Winck should have disclosed to the defendant what he learned after the entry of the Plea Agreement, the Court finds this would had no effect on whether the United States Attorney for the E.D. Kentucky could prosecute in this district. The Court has repeatedly suggested to the defendant that if he is dissatisfied with the outcome of the Tennessee plea agreement, he should petition Judge Jarvis to set aside his plea in the E.D. Tennessee. The United States had no obligation to disclose the Parks information to the presentence report officer or Judge Jarvis. Parks was a tightly held informant in a major undercover investigation. He continued his work until almost one year after the defendant was sentenced. The United States did not want to lose his services by revealing his identity. Furthermore, even if the United States had attempted to use information Parks had provided

about Murr for purposes of showing relevant conduct, AUSA Winck had represented the United States in *United States* v. *Andrews*, No. 89-5225, slip op. (6th Cir. Feb. 4, 1990), a case in which the Sixth Circuit Court of Appeals had recently vacated sentence and remanded for resentencing because of Judge Jarvis's improper consideration of relevant conduct. In view of this, if the government attempted to use the Parks information as relevant conduct, it ran the risk that it would expose the investigation for no good purpose if Judge Jarvis would refuse to consider the alleged relevant conduct.

For the foregoing reasons, the renewed motion to dismiss for breach of the Tennessee Plea Agreement is overruled.

II. MOTION TO DISMISS OR FOR NEW TRIAL FOR PROSECUTORIAL MISCONDUCT

This motion by defendant Murr was joined by defendants Huckelby and Rojas by leave of Court. The United States filed a response to the motion.

A. The Fifth Column[1]

The Court heard evidence on one of the fifteen instances of prosecutorial misconduct alleged by the defendant. Defendant asserted that the prosecution secretly negotiated and reached agreement with defendants Rogers and McKeehan to give testimony in this case but left these individuals as ap-

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[1] According to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1981), this term originated in reference to rebel sympathizers residing in Madrid during the Spanish Civil War, who were so named in 1936 when four rebel columns advanced on the city. The term is defined as follows:

> a group of secret sympathizers or supporters of an enemy that engage in espionage, sabotage, and other subversive activities within defense likes or borders of a nation.

parent defendants in the case, allowing them to "cooperate" with co-defendants. Defendant argued that by doing so, the United States compromised the integrity and confidentiality of the ongoing joint defense efforts to prepare for trial.

The Court heard the testimony of John P. Valiant, Jr., counsel for defendant Eddie Rogers, who entered a plea pursuant to Rule 20, Fed. R. Crim. P., in the Eastern District of Tennessee in August 1991. Counsellor Valiant testified that he did not engage in defense strategy meetings with the other defendants; nor did he share any information learned from other defense counsel with the United States. Counsel for defendant Tommy McKeehan, Ralph Harwell also testified. He testified that there were no serious negotiations with the United States until the week before trial and he was not sharing defense strategy with the United States. He conceded that on a couple of occasions McKeehan talked to Agent Merryman without Harwell being present, but only after Merryman spoke to Harwell. According to Counsellor Harwell, McKeehan had lots of questions about the details of the agreement, particularly as it might affect his mother, who was also a defendant. It was in this regard that McKeehan spoke to Merryman.

Both defendant Rogers and defendant McKeehan testified as well. Rogers testified that after his arrest, he had no contact with other defendants and did not share any information he might have learned about defense strategy from his attorney with the United States. Defendant McKeehan also testified that he did not meet with other defendants about defense strategy, nor did he share any information about same with the United States.

The Court finds the defendant's proof regarding the "fifth column" to be totally lacking in factual support.

B. Other Instances of Prosecutorial Misconduct

Defendant argued that the remaining fourteen instances, when taken as a whole, warrant a new trial because of their cumulative prejudicial effect. These include the prosecution's

attempted disqualification of defense counsel for improper reasons, offering the known perjured testimony of Ernie Nicely, disobedience of the Court's rulings concerning the Nicely testimony, failure to timely provide exculpatory evidence, failure to provide out-of-jury notice of 404(b)-type evidence, failure to instruct prosecution witnesses not to testify regarding inadmissible evidence, denial of defendant's right to counsel, unlawful disclosure of grand jury materials, misuse of administrative and grand jury subpoenas, making improper references to the defendant's incarceration, paying a witness in advance for testimony, introducing evidence of the events surrounding defendant's arrest in Knoxville in August 1989, and abandoning its duty to provide discovery and exculpatory evidence by permitting the FBI and DEA to determine what documents and tapes to produce.

After hearing argument on those matters considered most egregious, and having considered the papers filed by the parties on this motion, the Court finds no merit to the claims of prosecutorial misconduct individually or cumulatively, as reflected in the transcript of the hearing and oral argument. To the extent that the defendant may have made a valid claim of error on any of these points, it has not been shown that he was deprived of a fundamentally fair trial. *See Smith* v. *Phillips*, 455 U.S. 209, 219 (1982) ("the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor").

III. MOTION FOR NEW TRIAL DUE TO NEWLY DISCOVERED EVIDENCE

Defendant Murr moved for new trial based upon evidence that witnesses Parks and Nicely were involved in forging documents to transfer title of a car belonging to Alisha Sellars. Jerry Parks testified that he had Ms. Sellers' permission to sell the car in order to pay off some bad checks. The thrust of the argument is that the United States should have provided discovery on this impeachment evidence.

The Court found that this further attempt to impeach prosecution witnesses would have added little to the mountain of evidence presented at trial to impeach Parks and Nicely, and there is no reasonable likelihood that had the impeachment evidence been offered it would have had any impact on the verdict. The motion for new trial based upon newly discovered evidence is overruled.

IV. AMENDED MOTION FOR NEW TRIAL FOR FAILURE TO PROVIDE TIMELY DISCOVERY

This motion concerned the so-called "sixth Parks address book," and was joined by leave of Court by defendant Huckelby. The defendant asserts that the sixth book contained critical incriminating evidence, but was not disclosed as an exhibit to the defense prior to trial. The United States argued that it had produced copies of the essential pages to all counsel prior to trial. During the hearing, counsel for defendant Lawson produced a copy of the cover letter from the U.S. Attorney and photocopy of the pages from his files. Gov't Ex. 3. The transcript of the trial proceedings on September 18, 1991 indicates that there was no objection to publishing the "sixth book" to the jury following Parks' testimony about it (Tr. Parks 9/18/91 at 55), nor has the defendant shown that an objection appears elsewhere. Therefore, the motion is overruled.

V. MOTION FOR JUDGMENT OF ACQUITTAL

In evaluating a motion for judgment of acquittal, a court must consider the facts in the light most favorable to the government and determine whether evidence exists from which a jury might find the defendant guilty beyond a reasonable doubt. *United States* v. *Overmyer*, 867 F.2d 937 (6th Cir.), *cert. denied*, 493 U.S. 813 (1989); *United States* v. *Gorman*, 807 F.2d 1299 (6th Cir. 1986), *cert. denied*, 484 U.S. 815 (1987). The court must "view the evidence and all

reasonable inferences therefrom in the light most favorable to the government." *United States* v. *Reed*, 821 F.2d 322 (6th Cir. 1987).

Defendant Murr presented four principal arguments in his motion, to which the United States filed a response. The Court heard arguments on all issues.

A. Count 2

Count 2 of the Indictment charged defendant Murr, along with 12 other co-defendants, with possession with intent to distribute cocaine. The United States presented proof, and the jury convicted the defendant of possession with intent to distribute four kilograms of cocaine on August 25, 1988. The defendant argues that the government's proof was fatally defective. he argues specifically that the government's theory rests on an inference drawn impermissibly from nothing more than an appeal to criminal propensity as the basis for inferring guilt. Defendant Rojas joined in this argument in defendant Murr's motion, because he claims there was no testimony concerning his involvement in this particular count.

The proof adduced at trial was that on or about August 25, 1988 defendants McKeehan and Murr travelled to Kentucky to obtain cocaine from defendant Kenneth Lawson at the behest of Jerry Parks, who was trying to obtain a quantity of cocaine for his friend, co-defendant Billie Dye. Four kilograms of cocaine were ultimately to be purchased for $25,000 per kilogram by defendant Hurt. (Tr. Parks' Testimony 9/17/91 (DE #447) at 16). The plan was for Parks to go to Nashville to pick up the money and then Parks and Dye would meet with Murr and McKeehan to exchange the money for the cocaine at the designated exit off of I-75 near Lexington, Kentucky. (Tr. McKeehan's Testimony 9/16 & 17/91 (DE #494) at 40; Tr. Parks 9/17/91 at 15-16). McKeehan and Murr met Lawson as planned, although there was no money exchanged and McKeehan personally observed

no cocaine. Parks testified that he and Dye were late because had they encountered three separate incidents of running out of gas and having car trouble in their journey from Clarksville, Tennessee, where Parks picked up $100,000 from Hurt, to Kentucky. (Tr. Parks 9/17/91 at 16). Around midnight, McKeehan and Murr headed back to Knoxville. Parks and Dye arrived around 3:00 a.m. the next day. *Id.* at 17. After figuring out that they had missed connections with Murr and Lawson, they stayed the rest of the night at a Holiday Inn in Kentucky, and returned to Knoxville the next day, at which time they checked into a motel and called Murr. Parks testified that Murr told him it would be another day before he could get the cocaine to Parks. They later made arrangements to meet in Knoxville, during which meeting the exchange of money and cocaine occurred. *Id.* at 19-21. Parks returned to the motel, transported the cocaine to Nashville, and met Hurt at Tiny Town, Kentucky (in the Western District of Kentucky) to transfer the cocaine. *Id.* at 22.

The United States argued that from the evidence at trial it was reasonable to infer that Lawson had the cocaine in Kentucky in August when Parks was late due to car trouble, even if McKeehan did not see it. Murr and McKeehan, and Parks and Dye had all travelled by agreement to Kentucky for the sole purpose of completing a cocaine deal. On the basis that it was reasonable to infer that Lawson had the cocaine at the time he met with Murr and McKeehan, the defendant was liable as charged for (constructive) possession with intent to distribute cocaine in Kentucky, or alternatively under a *Pinkerton* theory of liability. Moreover, when Parks failed to show up at the designated meeting place, and he and Murr subsequently made arrangements to complete the deal, Murr produced the cocaine the next day and this cocaine was eventually distributed by Hurt in Tennessee. This evidence corroborates the inference to be drawn about the meeting between Lawson, Murr and McKeehan the day before the deal went down.

Defendant Murr argued that this theory invites sheer speculation by the jury. He contends that jury could only

have convicted Murr on Count 2 by inferring guilt from the other counts in the Indictment.

Defendant Rojas argued that there was no direct evidence that he was even in Kentucky in August 1988.

Analysis and Conclusion

Considering the evidence in the light most favorable to the government, the Court finds that there was sufficient evidence from which the jury could infer that the defendant Murr possessed cocaine with intent to distribute in Kentucky on or about August 25, 1988. There was no doubt that the plan entailed Murr obtaining cocaine from Lawson in Kentucky to sell to Dye and Hurt using Parks as an intermediary. The cocaine was present in Kentucky on the day the meeting was to take place, and the money was present in Kentucky that day or within hours as well. The only reason the deal did not happen as planned was because Parks, who was bringing the money, was delayed in reaching the Kentucky rendezvous. It is reasonable to infer that when Murr and McKeehan met with Lawson, Murr or Lawson possessed the four kilograms of cocaine in or near Lexington, Kentucky.

The fact that this possession was shown by circumstantial evidence does not lead to the conclusion that the evidence was insufficient. Circumstantial evidence alone is sufficient to support a conviction, and to do so the circumstantial evidence need not remove every reasonable hypotheses except that of guilt. *United States* v. *Stone*, 748 F.2d 361, 362 (6th Cir. 1984). Even if the cocaine was exclusively in Lawson's possession, liability could be imputed to Murr as a co-conspirator under *Pinkerton* v. *United States*, 328 U.S. 640 (1946).

Similarly, the evidence was sufficient to support the jury's verdict of guilty on Count 2 as a defendant Rojas under a *Pinkerton* theory of liability.

The defendants' motion for judgment of acquittal on Count 2 of the Indictment is overruled.

B. Counts 9 & 10

Counts 9 and 10 charged the defendant with possession with intent to distribute in the Eastern District of Kentucky on or about May 8 and 9, 1989. The defendant argued, as he did in an earlier request for a bill of particulars, that these two counts are duplicitous. The United States responded that there were two distributions on the same day to two different groups of people, and all co-conspirators are liable for both drops under the *Pinkerton* theory.

The defendant referred the Court to the grand jury testimony of Clyde Merryman, from which the indictment was drafted, as illustration of the defendant's theory that the indictment had been drafted in error. According to the defendant, it was Merryman's testimony that there were two drops in one day at the deal charged in Count 11, but not at the deal charged as having taken place earlier in May in Counts 9 and 10. At the May 8 deal charged in Count 9, Rojas is supposed to have slipped a note to McKeehan telling him that they (McKeehan, Parks, Murr) were paying too much by going through Lawson and inviting them to deal directly with him, Rojas, by giving McKeehan his telephone number. But it was not until after Murr gave his consent to dealing around Lawson and later in the month, May 18, 1989, that Parks and McKeehan made their first direct buy from Rojas. (Tr. Parks 9/18/19 (DE #446) at 46-50). Parks testified that on this occasion Rojas was nervous about seeing Lawson while he was dealing with McKeehan and Parks, because Lawson and "his people" were up at the next exit along I-75. *Id.* at 50.

The Court agrees with the defendant that Counts 9 and 10 are duplicitous. Even if the Indictment was not drawn in error, the evidence presented at trial was not sufficient to support a finding of guilt as to both Counts 9 and 10 for any of the defendants found guilty of both of these counts. As to defendant Murr's second argument, the motion for judgment of acquittal is sustained to the extent that Count 10 is dismissed. Further, the Court *sua sponte*, dismisses Count 10 as to all defendants convicted of same.

C. Count 13

Count 13 charged defendant Murr with engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848, by violating 21 U.S.C. § 841 on more than three occasions in concert with at least five other persons "with respect to whom ROBERT DALE MURR occupied a position of organizer, supervisor and manager. . . ." The defendant argued that the evidence that the defendant was a manager or supervisor was insufficient to support his conviction on this count.

Specifically, he contended that the defense has never known which five individuals the jury found were supervised or managed by defendant Murr. More importantly, because the government's theory of *who* was supervised has shifted significantly from the time of the indictment to the time of trial, he asserted there was a fatal variance between the prosecution's indictment and the proof at trial. This variance allegedly abrogated the function of the indictment as the essential link between the grand jury's consideration and the prosecution's case at trial. *See Russell* v. *United States*, 369 U.S. 749, 768 (1962).

Defendant speculates that the explanation for the government's "shifting theories" between grand jury testimony and trial proof is the Sixth Circuit's decision in *United States* v. *English*, 925 F.2d 154 (6th Cir. 1991). In this case, the court of appeals held, among other things, that proof of a buyer-seller relationship alone is insufficient to establish managerial role. The case was decided at or near the time of the indictment. Defendant asserted that several potential subordinates mentioned before the grand jury were either cast in a different light or completely out of the picture at trial, because the government's theory of supervision was no longer viable after *English* was decided. In particular, Jimmy Hurt was described by Agent Merryman before the grand jury as a regular customer. However, by the time of trial the government sought to show that Murr supervised Hurt because he distributed cocaine to Eddie Rogers on several occasions after Parks' arrest.

The defendant also argued that the evidence adduced in support of the prosecution's theory at trial was insufficient. He targeted particular alleged subordinates: (1) Jim Hurt was an unsatisfactory replacement distributor for Parks after his arrest because the quality of cocaine Hurt distributed was inferior; (2) Tommy McKeehan had his own network and operated as a peer to Murr; (3) Ernie Nicely was a former business partner of Murr's, he testified that he never transacted any drug business with Murr, he is a pathological liar; and (4) Judy Murr's involvement was minimal at best.

The United States responded that the grand jury heard testimony about Jerry Parks, Tommy McKeehan, and Bobby Phibbs, as well as Ernie Nicely, Jim Hurt, Judy Murr, Diane Whited and others. It asserted it was not required to introduce proof at trial about all of the individuals identified as having been supervised to the grand jury.

"A variance occurs when the proof introduced at trial differs materially from the facts alleged in the indictment." *United States* v. *Beeler*, 587 F.2d 340, 342 (6th Cir. 1978). If a variance creates a substantial likelihood that a defendant may have been convicted of an offense other than that charged by the grand jury, it is treated as a construction amendment to the indictment and considered prejudicial *per se*. *Id*. That is not the situation in the case at bar. The Court rejects defendant's variance argument, and finds that to the extent the proof did vary from the testimony upon which the Indictment was based, the difference was not material. Furthermore, it fell far short of creating a substantial likelihood that Murr was convicted of an offense other than that charged in Count 13.

At the hearing on April 2, 1992, the Court considered arguments on each individual alleged by the United States to have been managed or supervised by defendant Murr. The defendant did not contest the status of Diane Whited, Jerry Parks, and Robert Phibbs. After reexamining the evidence regarding each person's role and relationship to Murr separately, the Court finds the evidence regarding only one of

the seven persons presented by the United States to the jury as having been supervised by defendant Murr was insufficient.

Jim Hurt

Despite defendant's efforts to characterize Merryman's testimony before the grand jury about Jim Hurt as describing only a buyer-seller relationship between Murr and Hurt, it is clear that more was contemplated even before the indictment was returned. Merryman testified that Hurt had been a long time customer of Murr's and Hurt was instructed to deal with Parks and Parks was instructed to deal with Hurt in obtaining cocaine from Murr. There had been plans for Hurt to distribute cocaine out of a booth at Murr's Auto Auction. The fact that more evidence of Murr's supervision of Hurt surfaced when Eddie Rogers began to cooperate with the government does not indicate that the United States shifted its theory, and certainly does not constitute the basis for finding that the indictment fatally varied from the proof at trial. The United States is not bound to present the identical proof of Murr's supervision of Hurt at trial that it presented to the grand jury.

At trial, Eddie Rogers testified that Murr brought Hurt to him after Parks was arrested and told him that Hurt would take Parks' place as his cocaine distributor. Although Rogers later complained about the quality of the cocaine he was purchasing from Hurt, this does not indicate that Murr was not supervising Hurt. While dictating the quality of drugs may be an indicia of supervision, *English*, 925 F.2d at 157 (citing *United States* v. *Jones*, 801 F.2d 304 (8th Cir. 1986)), ineffective control does not in and of itself indicate a lack of supervision. The evidence of Murr's supervision of Hurt was sufficient to send to the jury.

Tommy McKeehan

The evidence that defendant McKeehan was supervised by Murr presents a close call. The great weight of the testimony, if all the testimony is taken as being true, was that McKeehan

and Murr were peers. Each operated his own cocaine distribution ring. Where the two came together, however, was in obtaining cocaine throught the Kentucky connection. Murr's contacts with Lawson were the linchpin of this contact.

There was sufficient evidence that Murr called the shots vis-a-vis Lawson and Rojas. McKeehan testified that defendant Murr made advance arrangements by pay phone for the Kentucky transactions, which McKeehan and Parks typically undertook. (Tr. McKeehan at 48-49). When Rojas provided his telephone number to McKeehan to encourage him to deal directly with him instead of through Lawson, McKeehan and Parks discussed it with Murr before making direct contact with Rojas. *Id.* at 66-67; (Tr. Parks 9/18/91 at 47-48). Parks testified that Murr questioned them quite closely about how they had obtained the number. Murr considered it a breach of protocol to step around Lawson, but if Rojas had come to them first, it would be all right. (Tr. Parks 9/18/91 at 48). According to McKeehan, he contacted Rojas after Murr said, "okay, that would be okay to go ahead and start doing that deal with Tony [Rojas]." (Tr. McKeehan at 67). McKeehan also testified that at times he stored cocaine for Murr. *Id.* at 134, 154. *See United States* v. *Jenkins*, 904 F.2d 549, 554 (10th Cir.), cert. denied, __ U.S. __, 112 L.Ed.2d 404 (1990).

The Court finds that the relationship requirement was satisfied as to Tommy McKeehan because Murr dictated the critical terms by which McKeehan could obtain cocaine from Murr's Kentucky source.

Ernie Nicely

The Defendant contends that the only reasonable conclusion to be drawn from Nicely's testimony is that he was at one-time a business partner of Murr's. Defendant bases this conclusion upon his attack on Nicely's credibility.

There was credible evidence at trial that Nicely played the role of money launderer for defendant Murr. At his direction, Nicely paid obligations of Murr's legitimate businesses in

cash, and handled other financial transactions related to the cocaine conspiracy for Murr. The Court recognizes the role of money-launderer in drug conspiracies as being vital to diverting ill-gotten proceeds into legitimate channels. *See United States* v. *Todd*, 920 F.2d 399, 406 (6th Cir. 1991) ("Money-laundering is an act integrally related to the success of a conspiracy to distribute drugs.") There was sufficient evidence to submit Ernie Nicely as one of those supervised by Murr to the jury.

Judy Murr

As to Judy Murr, the Court agrees with the defendant that there was no direct evidence that she was consciously a part of the drug conspiracy or did anything in furtherance of the conspiracy. Although she may have conveyed a message to Parks on the night of the missed connection discussed above with reference to Count 2, Parks did not testify that Judy Murr had knowledge of what the deal was. There was testimony that Parks was instructed to deliver money to her if defendant Murr was unavailable, but there was no testimony that money was ever delivered to Judy Murr.

Conclusion

In sum, there was sufficient evidence for the jury to find six of the seven persons that the United States argued were supervised, managed or controlled by defendant Murr were, in fact, eligible subordinates, or countables. It is not necessary for a jury to unanimously agree on the identities of five persons in order to convict. *English*, 925 F.2d at 159. Moreover, this Court provided ample guidance to the jury to assist them in determining whether a particular individual was supervised, managed or controlled. The CCE instruction given included a list of five elements to be proven beyond a reasonable doubt to convict the defendant on the offense charged, as well as the following discussion and definition of the supervision requirement:

> The fourth requirement is that you find beyond a reasonable doubt that defendant, ROBERT DALE MURR, occupied a position of organizer, a supervisory position or any other position of management. The terms organizer, supervisor, or manager are to be given their usual and ordinary meanings as commonly understood by the public or business community. An organizer can be defined as a person who puts together a number of people engaged in separate activities and arranges them in their activities in one operation or enterprise. A supervisory position can be defined as meaning one who manages or directs or oversees the activities of others. In other words, the government must prove beyond a reasonable doubt that defendant Murr was more than just a fellow worker, but likewise defendant Murr need not be the dominant organizer or manger as long as he was in a managerial position with respect to five other persons.

The defendant's motion for judgment of acquittal is overruled as to Count 13 of the Indictment.

D. Competency of McKeehan and Parks

Defendant Murr argued that during the course of the pretrial and trial proceedings, serious questions were raised as to the competency of two key government witnesses, Jerry Parks and Tommy McKeehan, He contended that when a witness is a key witness for the prosecution, justice demands a strict standard of competency. *United States* v. *Crosby*, 462 F.2d 1201, 1203 (D.C. Cir. 1972). It is the court's obligation to ensure that a witness meets that minimum standard of credibility necessary to permit a reasonable man to put credence in his testimony. 3 J. Weinstein & Berger, WEINSTEIN'S EVIDENCE ¶ 601[01] (1982).

Defendant Murr asserted that at the time McKeehan entered his plea and testifed at trial he was suffering from a

serious mental illness. The witness admitted to a history of mental illness, including depression, paranoia and hallucinations. Only eight days before trial, McKeehan's treating psychiatrist for the past two years signed an affidavit stating that in his professional opinion McKeehan would be unable to assist counsel at trial due to confusion, agitation and hallucinations.

As to Parks, the defendant contended that Parks falls into that rare category of witnesses whose testimony is so incredible that no reasonable juror could believe it. Parks has been found mentally incompetent and criminally insane over a span of approximately 18 years by four judges and ten forensic psychiatrists. Even if he is not and never has been truly incompetent, the defendant argued that he had a proven track record of being such an effective and pervasive liar that his testimony, standing alone, is not enough to support a guilty verdict as to Murr.

The United States responded that both witnesses' testimony was corroborated by the testimony of other witnesses and by physical and documentary evidence. There was no reason to remove the credibility determination from the jury.

The undersigned had the opportunity to observe Jerry Parks on the witness stand on at least three occasions before, during and after the trial of this case. He was lucid, he knew where he was, he knew what he was doing, and he knew what he was saying. He admitted to "conning" other judges as to his competency.

The Court also had several opportunities to observe Tommy McKeehan as a witness and in pretrial proceedings. His pretrial "incompetency," which arose before he entered into a plea agreement with the United States, was rejected by the undersigned in a firm belief that defendant McKeehan's anxiety was caused by his confronting the unpleasant prospect of this trial and that he was trying every way possible to wriggle out of the inevitable. As a witness, McKeehan demonstrated that he was fully aware of where he was, what he was saying, and the significance thereof.

The Court would find an independent evaluation of the competency of either Parks or McKeehan to be of little probative value, in light of its firsthand observation of both of these witnesses. Moreover, even if a forensic specialist found Parks or McKeehan to be incompetent at this time, such a finding would not be dispositive as to the witness's competence or mental state when he testified in September of 1991 at the trial of this case, or at the hearings held in August 1991.

The Court having given thorough consideration to the defendant Murr's motions; and being otherwise sufficiently advised,

Accordingly,

IT IS THEREFORE ORDERED:

(1) that the renewed motion of defendant Murr to dismiss for breach of plea agreement, the motion to dismiss or for new trial for prosecutorial misconduct), the motion for new trial based upon newly discovered evidence, and the amended motion for new trial are **OVERRULED** for the reasons stated herein and in the transcript of proceedings March 31 - April 2, 1992, as reflected in the Order of the Court entered April 2, 1992;

(2) that the motion of defendant Murr for judgment of acquittal be, and hereby is **SUSTAINED** in part, and **OVERRULED** in part, as indicated herein and for the reasons stated herein and in the transcript of proceedings March 31 — April 2, 1992;

(3) that Count 10 of the Indictment be, and hereby is **DISMISSED** as to all defendants.

This 22 day of May, 1992.

/s/ HENRY R. WILHOIT, JR., JUDGE